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HON. JOSEPH BELL, LL. D.

The memory of one who has lately passed from amongst us, in the midst of honorable age and accredited usefulness, besides being treasured, as it is, in the hearts of near and dear friends, should have its public record also, for the double purpose of respect and emulation, and in something more enduring than the passing journals of the day.

It seems peculiarly proper that one whose substantial fame rests, as he would have it rest, on his legal character and attainments, should be commemorated in a journal devoted to the interests of the profession of which he was so prominent a member. The slight sketch that follows, of the Hon. Joseph Bell, although it does but imperfect justice to his memory, is perhaps as full as is consistent with the brief time allowed for preparation, and the few materials which, through the unobtrusive disposition and personally reserved inclination of the deceased, have, either orally or in any other form of record, come into the possession of his friends.

The early life of most of the hardy sons of New England, especially our Granite sons, is rarely little more than a record of struggles with the limited if not directly adverse circumstances by which they were surrounded. The "*res angusta domi*," originally a classic conception, is, in truth, a stern New England reality; a reality, however, not without its countervailing benefits; for in the uses of adversity is comprehended much of that energy and self-reliance which characterize so many among us whohave become

emphatically the artificers of their own fortunes. The Hon. Joseph Bell, although of respectable and not poor parentage, was early made aware, as one of a family of nine children, of the necessity of self-exertion; and fortunately the lesson, in this case, was to be learned by one possessed, from the first, of a sound mind in a sound body. He was the third son of Joseph and Mary Bell (originally Houston) of Bedford, N. H., and was born in that place, March 21, 1787. The father, a reputable mechanic, was also a native of Bedford, but the grandfather was born in the north of Ireland. Emigrating to this country, when a mere youth, with his father and family, who were among the first settlers of Bedford, he connected himself by a second marriage with the Londonderry branch of the Bell family. From a grandmother of such a race, and also from a strong-minded and discreet mother, the subject of this notice would have been recreant to his sterling descent if he had not early evinced the possession of talents of no ordinary character. Probably an early indication of ability and taste for learning led to his designation, from among the five brothers, for the academical and collegiate course; for which *one*, and in former times but one, of a large New England family, however promising the talents of all, could generally be selected.

After preparatory studies, fitting him for admission to advanced standing, Mr. Bell entered Dartmouth College, in 1805, and was graduated in 1807, at the age of twenty years, with the reputation of a sound rather than that of a showy scholar, and the character of a high-minded and independent young man, rather than that of a cringing sycophant for College honors. His advanced entry in College, and occasional absences in term-time, while engaged in the necessary avocation of school-keeping, probably prevented his graduating with all those "distinguished honors" which the youthful mind sees connected with the assignment of parts by the College Faculty; but his sound scholarship is attested by the fact that he was one of the limited number (about a third of the class) originally elected to the *Phi Beta Kappa Society*, of which he was more than once chosen the Anniversary Orator, and by the deference then and since uniformly paid to his talents and attainments by his College associates, many of whom have themselves been eminent in the literary and professional walks of life. That the early pledges of emi-

nence, so apparent to his classmates, have been amply redeemed, in the estimation of the College Faculty, is evident from the unsolicited and honorary degree of *Doctor of Laws*, conferred upon him by his Alma Mater, in 1840.

Mr. Bell's necessities, rather than his inclination, led him for a time into the business of teaching; and it was in this connection, at Haverhill, N. H., that he formed such acquaintances, and established such a character, as afterwards led to his ready introduction into the successful practice of the law at that place. Having studied, a portion of the time required for admission to the bar, at Amherst, in the office of the Hon. Samuel Bell, afterwards Judge of the Superior Court of Judicature, Governor of New Hampshire, and Senator in Congress — a portion at Exeter, in that of the Hon. Jeremiah Smith, who had returned to the practice of the law, after being both Chief Justice and Governor — and the residue in that of the Hon. Samuel Dana, of Massachusetts — Mr. Bell was admitted to the bar in 1811, and soon after commenced practice in Grafton county, New Hampshire. Although subsequently induced to take charge of the bank at Haverhill, as its cashier, for several years, he had too much professional pride, and too much industry, to allow it to divert him from the sedulous practice of the law in his particular county. It probably prevented his being as early and as extensively known as he would otherwise have been in the other counties of the State — and led, doubtless, to some degree of that indisposition which he always manifested, even after his release from such financial confinement, about making the circuit of the several counties, to which he was often and most urgently solicited. In addition to his large private practice, Mr. Bell discharged for some years a portion of the duties of prosecuting officer, under an early appointment of the executive, as solicitor for the county of Grafton.

As a lawyer, Mr. Bell was distinguished for a soundness of judgment, an extent of legal learning, a patience of investigation, and a force of elocution, which commended him, both as a counsellor and an advocate, to the confidence of the entire community; and, so blended were his powers as an advocate with the most obvious judicial qualifications, that a seat on the supreme bench would have been insured to him, under almost any administration of the State government, on the least intimation from him of a willingness to accept it. There was in him, what is not

always nor perhaps often found united in the same individual in so full and fair proportions, a quickness of apprehension, joined to a solidity of judgment, which rendered his services peculiarly valuable as a counsellor and advocate. He could perceive readily the strong points of his client's case, and present them with force and eloquence to the Court and jury; with less disposition, and perhaps less power than many others, to weave around his argument the web of ingenious sophistry, or, by a circumlocutory process of inductive reasoning, lead the mind through the weaker outposts to the main fortification. His arguments were rarely faulty when addressed to the Court. If sometimes so when confined to the jury, it arose perhaps from a contempt of the introductory clap-trap, so common in forensic addresses, as a preliminary means of flattering their intelligence and conciliating their favor. He may sometimes have misjudged, by laying open his strong points too readily, and perhaps occasionally weakening the effect by a subsequent introduction of less important matter; but generally his practical good sense, and intuitive wisdom, guided him to right issues and successful results. In the examination of witnesses, he usually displayed great power; and his eagle-eyed far-sightedness, while often the shield of Achilles to his own client, was as the testing spear of Ithuriel when directed against his unfortunate adversary. The successive volumes of the New Hampshire Reports bear witness to the ability of his legal arguments, and in some inadequate degree to the extent of his professional practice.

It has been thought an error for a lawyer to enter with deep personal feelings into the case of his client. Doubtless those are the happiest, in the wear and tear of professional life, who are not naturally susceptible of the tenderest emotions, or who can divest themselves of any and every feeling save an official interest in the business intrusted to their management. A lawyer may sometimes prove himself personally too sensitive even for the interest of his client. It would often do as well if he could fully realize and exemplify the case of the advocate, who, in reply to a question as to his retainer, and for whom he was concerned in a particular action, said that he was "*engaged* for the plaintiff, but *concerned* for the defendant." However, it is always gratifying, to one so unfortunate, as either to elect or be elected as plaintiff or defendant in the law, to know that he has secured, and can carry along with

him, the sympathizing interest of his counsel, as that of a personal friend. Mr. Bell, it has seemed to the writer, inspired this confidence, to a great degree, in those who were his clients. He entered with deep personal interest into their case; and evinced, in this regard, an unselfish feeling which money could not secure, and the highest fees he might receive would fail to repay. The writer may speak with some little knowledge, certainly, of one particular case; for the only incident that is recollected ever to have interrupted for a moment a thirty years' friendly intercourse, arose, out of Court, from the ardor of feeling and expression on the part of Mr. Bell in behalf of a client, who could not, by any measure of pecuniary means, or of personal or other influence which he possessed, have adequately repaid him for his official labors.

As a more ample illustration of Mr. Bell's professional character, it is gratifying to be able to incorporate in this article, although received subsequent to its preparation, the following extract of a letter from a gentleman sustaining one of the highest judicial offices in New Hampshire, who had practised side by side in the same county with Mr. Bell, and known him intimately and well for several years. Had the letter come from any other source, the gentleman's own name might have been mentioned among the older and *then* more distinguished men to whom he has adverted. The praise of a distinguished man "*laudatus, a laudato viro,*" is in this case the more acceptable, because the sketch he gives of Mr. Bell seems to his friends so exact and truthful.

"My observation of Mr. Bell's practice began in 1828. He had then been at the bar seventeen years. His professional habits were all formed and confirmed. He was in full and very large practice, and his powers fully developed and matured. His reputation became afterwards more widely extended; but to me, who observed him habitually for the next succeeding twelve years, it was not easy to see any increase in his ability. Of his growth and progress, therefore, in the profession, I cannot speak.

"I saw him, indeed, at the bar, as early as 1821. In May of that year, being a lad in College at Hanover, I strolled up to Haverhill, and remained there a week, while the Court was in session. I remember distinctly being present at that term, when a cause was tried, in which Mr. Bell was counsel against Jeremiah Smith, who had been

repeatedly Chief Justice of the State, and had then come back to the bar, in advanced age, but with unabated vigor and spirit. Among the counsel, who attended at that term, I recollect Jeremiah Smith, George Sullivan, Parker Noyes, Richard Fletcher, and John C. Chamberlain; and when I came to the bar, George Sullivan, Ezekiel Webster, Levi Woodbury, Ichabod Bartlett, and Joel Parker, were among the men who practised regularly in Grafton county.

"This list of distinguished names will help to show how Mr. Bell's powers were exercised and trained. His practice, till within a short time before he left the State, was principally confined to his own county of Grafton, and he never had more than occasional engagements out of it. But from the time of his early practice, he was obliged to defend his position, as the undisputed leader of the Grafton bar, against men as able as any that the State could produce.

"He was remarkably deliberate, thorough, methodical, almost formal, in his preparation of a case, and never willingly trusted to the examinations of others. He was particularly attentive to the pleadings, a title of the law with which he was extremely familiar. In this part of practice, he derived great advantage from his own readiness and exactness, and seldom allowed an adversary to escape the consequences of mistake or negligence.

"He was as far removed as possible from all the low arts by which clients are sometimes obtained and retained; yet no man could be more patient with clients and assistant counsel. He listened to all their statements and suggestions with attention and uniform civility. His business in Grafton county was very large and miscellaneous; but it was done promptly, without hurry or confusion, and with the utmost order and exactness. His numerous papers were arranged and kept in perfect order, and ready to be produced at once, when needed. I do not remember a single instance of a moment's delay, for want of a paper or document, which it was his business to produce. He never failed, in the press of his business, to bestow the necessary amount of attention and labor on the most trifling detail of the smallest matter intrusted to his management.

"His great ability was seen, not so much in extraordinary efforts made at long intervals, on showy occasions, as in the habitual diligence and skill, the general vigor and power, which he at all times brought to the discharge of

his professional engagements, whether trifling or important.

"His analysis of fact, and of the law, was often remarkably acute and subtle; but his arguments, whether addressed to the Court or jury, were seldom extended to great length. His judgment, or the natural turn of his mind, led him rather to seize on the strong and prominent points of his case, than to run it out into a sifting examination of details.

"His examination of witnesses was usually brief, and very direct to the point. He did not appear to rely so much on discrediting an adverse witness, by cross-examination, as some other distinguished advocates, whose practice I have observed.

"He was a most thorough-bred lawyer. His learning was not diffuse and miscellaneous, but deep and very exact. He was constitutionally averse to all display, especially to any thing like display of his legal attainments. To those who knew his intimate acquaintance with books and authorities, there was often a suppression and disguise of his learning, which looked almost like affectation. His powers and attainments appeared greatest when their display was accidental, and partly involuntary; as when some question arose and was discussed incidentally in the course of a trial. Such impromptu discussions were much encouraged by the late Chief Justice Richardson, who entered into them with great readiness and ability.

"On such occasions Mr. Bell exhibited, in my opinion, far greater ability than in the discussion of legal questions formally set down for argument. His keen analysis of facts, his ready command of the most exact legal phraseology, his thorough mastery of legal principles, and his prompt recollection of cases and authorities, gave him great advantage, where time was not allowed for the plodding preparation which some men require."

As a politician, Mr. Bell, although always firm and unwavering, was never obtrusive. His opinions, formed on mature reflection, and maintained with a steadfastness of purpose rarely equalled in the many mutations of party politics, were so held and defended by him as not needlessly to wound the feelings of others. Above the personalities and exclusiveness of many politicians, who think that a defence of the right can only be effective by direct aggression upon the wrong, he was practically tolerant of the conflicting opinions of others, however strong the con-

victions of his own mind might be of the fallacy of their principles, and oftentimes of the falsity of their professions. Mr. Bell's political friends always knew where to find him; and this very fixedness of purpose, being well understood, commanded the respect even of his most determined opponents. No one ever thought of approaching him with any expectation of his changing, for selfish considerations of any kind, his well-known and fixed opinions. In political principle he was truly a Granite man. Once planting his foot on what he regarded as a stable platform, he might, with all the assurance of the gallant Fitz James, confidently exclaim,

> "Come one — come all! Sooner shall fly,
> From its firm base, this rock, than I."

He was never an office-seeker; but, in the various instances in which political office was conferred upon him, it was the result, not of that popularity which is run after, but that which follows a conviction in the public mind of "the hour and the man" being then before them. He early imbibed the principles of the Washingtonian school of politics; and while many, who started in the race with him, lost sight of the identity of the platform, in the political mazes of succeeding times, Mr. Bell continued to find it, as he believed, in what have been successively characterized as the Federal, National Republican, and Whig parties.

As a legislator, Mr. Bell was distinguished for assiduity and intelligence, and confided in by all, as a man of sound discretion, of legal learning, and of strict integrity of purpose. He was not distinguished for frequency in debate; but was listened to, when he did speak, with the most fixed and gratified attention. He was one who, almost more than any man so often before the public in the various capacities of a scholar, a lawyer, and a legislator, obeyed to the letter the injunction of "never beginning to speak till he had something to say, and of being sure to leave off as soon as he had done." Living originally, and until considerably past middle life, in a State, which, as a community of voters, had but little sympathy with his political opinions; in a county which had proportionately still less; and in a senatorial district which had next to none; it is not strange that, eminent as Mr. Bell was in point of qualifications, he was not called, while resident in New Hampshire, to any of her higher political offices. Such

was the most commonly prevailing political sentiment of the particular town of his residence, in connection with his own indisposition for office, arising mainly from the pressure of his professional engagements, that, with a single exception, the session of 1821, it was not until Mr. Bell had attained to the ripe age of more than forty years, that he was elected (in 1828) to the popular branch of the New Hampshire Legislature. His fame had, of course, long preceded him at the seat of the State Government. The writer of this article chanced to be a member of the same Legislature, and he well remembers the respect with which Mr. Bell was looked up to by men of all parties, and the anxiety there always was to hear him on any matters of debate. Such was then the confidence in his legal attainments, that, comparatively new as he was in the business of legislation, he was placed on the most important Committee — that of the Judiciary; and was the most prominent member of it, next to the Chairman, the Hon. Ezekiel Webster. Mr. Bell was occasionally re-elected a Representative during his residence in New Hampshire, and was always regarded as conferring more honor on the office, than the office did, or possibly could, on him. He had, now and then, the empty honor of being nominated and run for Congress, in a hopeless contest; and, had he remained a resident of New Hampshire, on any accession of his party to the power competent to bestow it, would doubtless have been called to represent the State in one or the other, and in time probably in both branches of the National Legislature.

Mr. Bell continued in the arduous and successful practice of the law in New Hampshire until the year 1841, when he removed with his family to this city. It was never his intention to engage actively as an advocate in the Courts of this Commonwealth. His ambition in this regard must have been fully satisfied by his success and his fame in his native State. Of ample pecuniary means, and of an age when "the heyday in the blood is tame and humble, and waits upon the judgment," it was natural that he should prefer, so far as he should further prosecute the profession, the quiet of office practice, and the giving of chamber counsel. It is believed that he was partly led to this conclusion by the consciousness, with which he would not distress his friends, that he was even then laboring under some symptoms of the internal difficulty which has at last

terminated in his so sudden decease. This difficulty, he had reason, even before leaving New Hampshire, to know, was, in his case, occasioned or aggravated by the excitement of public speaking. After a residence of four or five years in Boston, he was elected to the popular branch of the Massachusetts Legislature, in which he continued a member until transferred to the Senate, in 1848. While a member of the House, he discharged with much ability the arduous duties of Chairman of the Judiciary Committee; and for the last of the two years in which he occupied a seat in the Senate, he was the popular presiding officer of that body. During several years he was also Chairman of the "Whig State Central Committee" of Massachusetts; and in this capacity was called on to draft occasional addresses to the people, and to the exercise of that sound discretion, and vigilant assiduity, so fully exemplified by him in other spheres of action.

In the summer of 1850, Mr. Bell, in company with his brother-in-law, the Hon. Rufus Choate, took passage for Europe, in one of the Liverpool steamers, and spent two or three months in visiting various parts of Great Britain and the continent. His general health being good, and his system not unfavorably affected by any sea changes, the passage was to him a source of almost unalloyed pleasure; and from the incidents of his travel, both by land and water, he was well calculated to derive pleasure and profit, through his habit of observation, and readiness of appreciation of "men, manners, principles and things." He returned home in September of last year, apparently in vigorous health and cheerful spirits; although, while absent, he had occasionally exhibited to his travelling companion, as now recalled to mind rather than then apprehended, some symptoms of that affection of the heart and lungs which terminated so suddenly his valuable life. Indeed, it is supposed by his family that he himself had long apprehended some such sudden termination; but, such was his constitutional reserve on matters pertaining to himself, which he feared might trouble others, and such his resolute will and firm endurance, that even the nearest members of his own household were scarcely aware of any complaint, or any predisposition to sudden disease.

With his wife, two daughters and servant, Mr. Bell left home for Saratoga Springs, about the middle of July last; and seemed to friends who had long known him, and then

met him there, as in uncommonly good health and spirits. It was not until the evening of Wednesday, the 23d, that, in a walk with a friend, the Hon. S. H. Walley, of Roxbury, he manifested some slight symptoms of illness, and returned to his lodgings earlier than was expected. His family found him indisposed in his chamber, but not inclined to call for medical aid. A physician was, however, summoned during the night, and afforded him some temporary relief. He grew worse, and alarmingly ill, before evening of the next day, being fully conscious of his situation, and perfectly resigned and submissive to the last. He died at Saratoga Springs, on the morning of Friday, the 25th of July, and his remains were thence brought to his home in Boston, for the customary funeral solemnities.

In person, Mr. Bell was of commanding appearance, and of frank and agreeable manners, without any of that obsequiousness which pays court to the multitude for popular effect. In form above the middle size, and inclining to corpulency, with an eye of the keenest black, as if looking, from its overshadowing brow, "through the very deeds of men," and a head of firm and classic mould, Mr. Bell, aside from his position in society, could not fail, wherever he might move, to attract observation and arrest attention. This deference was not a result of his own seeking, but the homage that the multitude instinctively pay to men of obvious intellect and of imposing presence. It was not either from the finish of early training, or natural ease and grace of manner, that Mr. Bell so conciliated regard, and so commended his hospitality to his numerous visitors and friends; but from his dignified, and at the same time unassuming bearing, his quick discernment and ready insight into the qualities of others, and the conviction he inspired in those about him of their being in the presence of a true man; and, wherever he allowed himself to profess regard, of a firm and reliable friend. Of a genial and playful humor in his hours of relaxation from business, he readily appreciated the humor of others; and, with a twinkle of the eye, and an archness of expression peculiarly his own, was accustomed to enliven the domestic and social circle, by a pleasantry the more agreeable because connected with so rare a fund of general intelligence, and such a power of keen and critical observation.

Mr. Bell was peculiarly fortunate in his domestic relations. Connected with one of the most estimable and

accomplished families of New Hampshire, by marriage, in 1821, with the eldest daughter of Mills Olcott, Esq., of Hanover, his home was always the abode of refined hospitality, and of the most pleasant and social re-unions. Proud, as a husband and father, of the cherished inmates of his domestic circle, Mr. Bell was himself very much of a home man, and peculiarly domestic in his social relations. Even in his most extensive practice of the law, he was rarely absent at any considerable distance, or for any great length of time. Without extending to his children the ill-advised and indiscriminate indulgence so often witnessed, he was ever noted for his considerate kindness, and was looked up to by his family with the greatest respect and affection. Mr. Bell leaves a widow, to whom he had been united for thirty years by the tenderest ties; and four children, one son and three daughters, and two grandchildren, the representatives of a deceased daughter, to inherit, it is believed, not alone his ample estate, but a fair share of the mental and moral and social qualities, which so commended the father to affectionate and respectful regard. The deceased daughter, living greatly beloved, and dying deeply lamented, was married early in life, to George Wallis Haven, Esq., of Portsmouth, N. H. Another, the next oldest, was married, a year or two since, to Dr. J. B. Upham, of Boston. The son is doing credit to the name, as a partner in the law with the Hon. Rufus Choate.

Mr. Bell was a man of practice rather than of profession, of substance rather than of show, in the various relations of life. As was, centuries ago, said by the poet Æschylus, of Amphiaraus, the Grecian Augur, so it might truly be said of him, —

> "To *be*, and not to *seem*, is this man's maxim;
> His mind reposes on its proper wisdom,
> And wants no other praise."

He was not, technically speaking, a professor of religion, but a friend and supporter of good order, and of religious institutions, and a regular attendant upon the ministry at Park Street Church, in this city. His retaining to the last the full exercise of unclouded reason and the powers of his vigorous mind, his perfect resignation to the Divine will, and his expressions of trust and confidence in the Saviour, were well calculated to allay the anguish of his dearest friends at his lamented departure.

Recent American Decisions.

District Court of the United States. — Northern District of New York. — August 17 – 29, 1851.

EX PARTE JOHN DAVIS, PETITIONER FOR A WRIT OF HABEAS CORPUS.

The provisions of the 6th sect. of the fugitive slave act, that "the certificate of the commissioner shall be conclusive, &c., and shall prevent all molestation, &c., by any process issued by any Court, judge, magistrate, or other person whatsoever," applies only to a certificate which appears on its face to be granted, or by a reasonable interpretation of its language might have been granted, in conformity with the act, and in pursuance of the authority thereby conferred, by a person having power to grant it, and proceeding in a manner warranted by the act.

The provisions of the 10th section of the fugitive slave act, "that when any person held to labor, &c. *shall escape*," are clearly prospective, and inapplicable to the case of an escape occurring before the passage of the act.

Where it appears from the face of the certificate that the adjudication was made without evidence, the error can be corrected on *habeas corpus*.

By the common law of England and this country, the writ of *habeas corpus* is not grantable of mere course, nor without probable cause shown.

ON the 17th August, an application was made to Judge Conkling, in behalf of the petitioner, for a writ of *habeas corpus ad subjiciendum*, to be directed to Mr. George B. Gates, one of the deputy marshals of this district, in whose custody the petitioner was alleged to be, at the city of Buffalo. The petition alleged, that the petitioner was restrained of his liberty in the custody of the above-mentioned officer, under pretence that he was a fugitive from labor, and in virtue of a warrant, a copy of which was annexed to the petition; wherefore he prayed a writ of *habeas corpus* to discharge him from custody, on the ground that, as he was advised by his counsel, and believed, his imprisonment was illegal, that he was a free man, and that the commissioner, by whom the warrant was issued, had no jurisdiction to issue the same. Annexed to the petition, was a copy of a warrant issued by H. K. Smith, Esq., a commissioner of the Circuit Court of the United States, purporting to have been granted on the application of

Benjamin S. Rust, the duly authorized agent and attorney of George J. Moore, of Louisville, in the State of Kentucky, alleging that the petitioner owed labor and service to the said Moore, and that he was a fugitive therefrom. By an indorsement on the warrant, it appeared that the same had been executed and returned, and that the deputy marshal had the petitioner in custody, in virtue thereof.

The petition contained no allegation of irregularity in the proceedings before the commissioner, nor was it alleged in the petition, or by the counsel for the petitioner, that there was any insufficiency in the warrant, apparent upon its face.

This application was denied by the Judge, on the ground of want of probable cause; it being, as he stated, a settled rule both in England, and, in the absence of any statute injunction to the contrary, in this country also, that the writ of *habeas corpus* was not grantable of mere course, nor without probable cause shown. It was an extraordinary remedy for unlawful restraint of personal liberty, and no Court or Judge had authority to allow it, except in cases apparently of this nature. It was not enough for the petitioner to allege in general terms, that his confinement was illegal; he was required to show that it probably was so in fact. In the case before him, conceding the validity of the statute under which the commissioner had acted, not only had the petitioner failed to fulfil this requirement, but, on the contrary, it expressly appeared that the commissioner, in causing his arrest and detention, had only discharged an imperative duty enjoined upon him by law; and with regard to the Act, the Judge said he did not consider himself at liberty to treat its constitutionality as any longer an open question. Nearly a year had elapsed since it received the sanction of the two Houses of Congress, and, in accordance with the official opinion of the Attorney General of the United States, the approval of the President. No act of the national government had ever more strongly arrested the attention of the American people, or been more closely scrutinized. It had been repeatedly brought under discussion and consideration before the Judges and judicial tribunals of the country, both State and National, and in every instance its constitutionality had been unequivocally asserted and maintained. Among those by whom this opinion had either directly or indirectly been declared, are, at least, three of the Judges of the Supreme Court of the United

States, all of whom, moreover, are citizens of States in which slavery does not exist. Under these circumstances, Judge Conkling said, it was, in his judgment, wholly unnecessary, and would be scarcely decorous, for him to enter upon the examination of the question at all. At an earlier period it would have been his duty to do so, and to be governed by his own independent conclusions; and this duty, he should not, for a moment, have hesitated to perform.

The motion for a *habeas corpus*, having for these reasons been denied, a second petition was presented on the 19th, on which the motion was renewed. The petitioner states that he is still restrained of his liberty, in the custody of Mr. Gates, the deputy marshal; that after his arrest, in virtue of the warrant mentioned in his first petition, having been brought before the said commissioner, he, the said commissioner made out a certificate, directing the petitioner to be taken to the State of Kentucky, whence, as it was alleged, he had escaped, and where he still owed service. The petitioner further alleges, that as he is advised by counsel, and verily believes, the proceedings before the commissioner are null and void, for want of jurisdiction in the said commissioner to make the said certificate, because there was no evidence before him, that he, the petitioner, was a slave, but that, on the contrary, the proof, as the petitioner was further advised, established his freedom; that the said proceedings were founded upon an alleged record of the County Court of Jefferson county, in the State of Kentucky, which record is not exemplified under the seal of the said Court, in pursuance of the act of Congress, in such case made and provided, wherefore, as the petitioner is further advised, the said pretended record is void, and the commissioner acquired no jurisdiction under the same; that there was no other proof before the commissioner, aside from such pretended record, that the petitioner owed service to the claimant, Moore, but, on the contrary, there was proof that the claimant brought and permitted the petitioner to come to Cincinnati, in the State of Ohio, whereby, as he is further advised, and believes, he acquired his freedom. And the petitioner further states, that, to the best of his knowlege and belief, there was not before the commissioner any evidence, except the same pretended record of the fact of his escape from Kentucky; and lastly, that, to the best of his knowledge and belief, he is not detained for any other cause.

The petition, for reasons stated in the affidavit, is verified by the oath of Mr. Love, acting as the counsel of the petitioner.

On this petition, Judge Conkling granted an order *nisi*, returnable on the 26th day of August. On that, and the following day, the case was ably argued by Mr. *Talcott* for the petitioner, and Mr. *Foster* for the claimant.

In opposition to the rule, the counsel for the claimant read an affidavit made by Mr. Gates, the deputy marshal, setting forth the proceedings before the commissioner, and incorporating the certificate granted by him. Appended to the certificate, as forming a part thereof, was the petition of the claimant's agent and attorney, and the power of attorney under which he acted; the warrant of arrest; the transcript of a record of the County Court of Jefferson county, in the State of Kentucky, authenticated by the attestation of the clerk, and an impression of the seal of the Court thereon, stating it had been proved to the satisfaction of that Court, by the affidavits of two persons therein named, that the petitioner owed service to the claimant, and that he had, on or about the 25th day of August, 1850, escaped therefrom into the State of Ohio, which record was referred to, in the certificate, as the evidence by which the facts therein stated, were established before the commissioner; and the affidavit of the agent, of his apprehension of a rescue. At the close of the argument, on Wednesday, the 27th of August, Judge Conkling said he did not believe he should be able to decide the case, before the morning of the second day thereafter, but that he should endeavor to do it at that time, which he accordingly did, by delivering the following judgment.

Conkling, J. — An order *nisi* having been granted by me several days ago, for a writ of *habeas corpus ad subjiciendum*, to bring before me the body of John Davis, for the purpose of inquiring into the legality of his confinement, in the custody of one of the deputy marshals of this district, and the case having been fully argued by counsel, and considered by me, I am now to declare my opinion of the law thereupon.

The case is one in its nature, calculated, as we know, by recent experience, to arouse the passions and prejudices of men in this part of the Union; and this tendency, in the present instance, has been unhappily inflamed by an extraordinary incident reported to have attended the original

arrest of the petitioner. But the circumstances to which I have alluded, however deplorable, it is scarcely necessary to observe, can have no legitimate influence whatever upon the decision of the question before me, and are to be remembered, if at all, only for the purpose of inspiring a deeper sense of judicial duty, and greater caution in its discharge. If the prisoner is entitled by law to the privilege of the writ of *habeas corpus*, it must be awarded; if not, it must be withheld; and in neither event can the result afford any just ground for dissatisfaction, still less any apology for the indulgence of a spirit of insubordination to the laws of the land. It is proper, at the outset, to observe, that, as I hoped and expected, when the order *nisi* was made, the merits of the case are now as fully before me as they could be on the return of a writ of *habeas corpus*, should one be granted. The real question to be decided therefore, is, whether the petitioner is entitled to his discharge; for it is an obvious, as well as an established rule, that when, upon an application for a *habeas corpus*, it appears that it would be fruitless to the petitioner if allowed, it is not to be granted.

Before proceeding to an examination of the merits of this application, it may not be amiss to advert to the source of the power which I am called upon to exercise. The government of the United States is one of expressly delegated powers, and its functionaries can exercise no authority except such as, either in terms or by reasonable intendment, has been conferred by the Constitution, or by laws passed in accordance therewith. To guard against possible restrictions of the great privilege of *habeas corpus*, it was deemed expedient, by an express provision of the Constitution, to forbid its suspension, unless when, in case of rebellion or invasion the public safety might require it. With this exception, it was left, as one of the elements or incidents of the judicial power, to be regulated by law; and in order to give it vitality, it was necessary for Congress to confer the power to grant it, and to designate the functionaries by whom this power should be exercised. This was done by the 14th section of the Judiciary Act of 1789, which, as it has been authoritatively interpreted, invests all the Courts of the United States, and the several Judges thereof, with the power to issue this writ, "for the purpose of inquiring into the cause of commitment." The act does not prescribe the cases in which this form of remedy may be

resorted to, nor does it define the power of the Court or Judge in cases where it lies. Recourse for these purposes must therefore be had to the common law, and especially to the celebrated *habeas corpus* act of 31 Charles II., designed to correct and effectually to guard against the scandalous evasions and abuses by which the practical efficacy of the writ of *habeas corpus* had become in a great degree destroyed during the arbitrary reign of the Stuarts. (3 Black. Comm. 130–138); *Ex parte Bollman & Swartwout*, (4 Cranch's R. 75; 2 Condens. R. 33); *Ex parte Watkins*, (3 Peter's R. 193, 201, 202.)

[His Honor examined at length the authorities cited at the argument, and especially the cases *Ex parte Kearney*, (7 Wheat. R. 38); and *Ex parte Watkins*, (3 Peters' R. 193); "the latter being mainly relied on by the counsel for the claimant," and which establish the principle that when, by a Court of competent jurisdiction, a judgment in its nature final, has once been pronounced, it cannot be reviewed on *habeas corpus;* and he then proceeded as follows:]

It is upon this principle that the claimant relies, and the question is, whether or not it furnishes the rule of decision for the present case.

For the purpose of determining this question, it is proper to examine into the nature of the adjudication which it is proposed to bring under review. The adjudication was made by one of the commissioners of the United States, for this judicial district. The office of commissioner was created by an act of Congress, passed in 1812, by which the several Circuit Courts were authorized to appoint suitable persons to take acknowledgments of bail and affidavits, in civil causes depending in such Courts; and by an act passed a few years later, the persons so appointed were authorized to perform the like services in causes in the District Courts. By this latter act, and other acts, subsequently passed, other powers were successively conferred upon these officers; and lastly, by the first section of the act of September 18, 1850, known as the Fugitive Slave Act, they are "authorized and required to exercise and discharge all the powers and duties conferred by this act." The fourth section further declares, that the commissioners "shall have concurrent jurisdiction with the Judges of the Circuit and District Courts of the United States, in their respective circuits and districts." By the sixth section it is also enacted, that the certificates to be granted under the act, "shall be conclusive of the

right of the person in whose favor granted, to remove such fugitive to the State or territory from which he escaped, and shall prevent all molestation of such person or persons, by any process issued by any Court, Judge, magistrate, or other person whatsoever."

Now whatever ground for doubt, if any, might have existed, independently of this enactment, concerning the legal force and effect of these certificates, it may, I think, be safely assumed, that it was intended by Congress to place them, in this respect, substantially on the footing of judgments rendered by judicial tribunals, in cases within their jurisdiction. But, notwithstanding the wide scope of the doctrine laid down by the Supreme Court, in the *Watkins case*, I am also of opinion, and indeed this was distinctly admitted by the learned and able counsel who appeared for the claimant, that this conclusive effect can be ascribed to a certificate, only when it appears on its face that it was granted, or, at least, according to some reasonable interpretation of its language, might have been granted, in conformity with the act, and in pursuance of the authority thereby conferred. Unquestionably it should appear to have been granted, by a person having power to grant it, and proceeding in a manner warranted by the act. It is only to *such* certificates, that the principle of law relied on by the counsel for the claimant, can be applied, and such only can Congress be presumed to have had in view. I regret that the circumstances of the case, and my own indispensable engagements, requiring my immediate departure to a remote part of the district, preclude me from fortifying and elucidating this proposition, and reconciling it with the case *Ex parte Watkins*, by a reference to authorities. But I shall assume it as unquestionable. The counsel for the petitioner denies that the certificate now in question is of this character.

One of the objections to its sufficiency is, that the person by whom it was granted is therein described as "A commissioner appointed by the second Circuit Court," and as "A commissioner appointed by the Circuit Court for the second circuit," when in truth there is no such Court, and, of course, no such commissioners. The objection is true in point of fact, and if there was not another, of a more serious nature, this would, at least, require consideration. But it is further objected, that the case of the petitioner is not embraced by the act, or rather by that part of it under

which the proceeding was entertained, and by which alone it could have been authorized. It is due to the highly respectable gentleman, by whom the certificate was granted, to observe, that this objection appears not to have been made before him, and probably it was not thought of by him, or, until afterwards, by the counsel for the petitioner. The claimant saw fit to avail himself of the provisions of the 10th section of the act, by which the owner of a fugitive slave is permitted to make proof of the main facts of title and escape before a Court of Record, or some Judge thereof, in the State whence the escape was made; and having obtained a transcript of the record, which such Court is required to make, of the matters so proved, to exhibit the same to the Judge or commissioner, to whom application shall be made, in the State where the fugitive shall be found, as conclusive evidence of the facts therein stated. Such a record was produced before the commissioner, in the present case, and is distinctly stated in the certificate, to have formed the basis of his action in the premises. It was suggested at the argument, though apparently with no great confidence, that the commissioner might, by possibility, have had other competent evidence before him; but I am clearly of opinion, that no such supposition is admissible. There is not, in the papers before me, the slightest intimation to this effect, but, on the contrary, the transcript is exclusively referred to throughout, as the evidence by which the title of the claimant, and the fact of escape were established. But the escape is also throughout alleged to have occurred "on or about the 25th day of August, 1850," whereas, the act was not passed until the 18th of September following; and it is upon these dates that the objection is founded. The language of the 10th section of the act is this: "*And be it further enacted,* That when any person held to labor or service, in any State or Territory, or in the District of Columbia, shall escape therefrom, the party to whom such service or labor is due, his, her, or their agent or attorney, may apply to any Court of Record therein, or Judge thereof in vacation, and make satisfactory proof," &c.

Now it is insisted that this provision is clearly prospective, and therefore inapplicable to the case of an escape from labor or service, occurring before the passage of the act; and such, I am constrained to say, appears to me to be the plain sense of the enactment. It was argued by the

counsel for the claimant, that this being a remedial act, it is to be so construed as to suppress the mischief, and advance the remedy; and that if it can be reasonably inferred from its whole tenor, that the provision in question was designed to act retrospectively, it is to be so interpreted. But when the language of a statute is unambiguous, and leads to no absurdity or palpable injustice, it is to be interpreted according to its natural import. It may be conceded that the legislative intent imported by the words used might have been more explicitly declared, by the addition, immediately after the word "shall" of the word *hereafter*, or of the words *after the passage of this act;* but it cannot, I think, be maintained that this intent is not unequivocally expressed by the word "shall" alone. If I were permitted, however, to look beyond the terms of the provision itself, and to speculate upon its probable design, I am unable to perceive that the result would be varied. The only other part of the act specifically referred to by the counsel for the claimant, for the purpose of shedding light upon that under consideration, is the beginning of the sixth section, which provides for a different mode of establishing the facts of title and escape.

The words here are: "That if a person held to service or labor in any State or Territory of the United States, has heretofore, or shall hereafter escape," &c. The argument is, that it is manifest from this language that Congress intended to provide for cases of prior as well as subsequent escape. There can be no doubt of this, so far as the provisions of this section are concerned. But it is to be considered, that the 10th section introduced a most important innovation upon the law as it was before the passage of the act. It authorizes an *ex parte* application to a Court or Judge, to be selected by the claimant, in the absence of, and without notice to, the party to be affected by the proceedings, to determine questions of fact, involving his freedom or servitude for life, and declares the decisions of such Court or Judge, to be full and conclusive evidence of the facts decided, and therefore binding upon the judgment and conscience of the Court, Judge, or commissioner in any other State, before whom the alleged fugitive may be reclaimed. It is not my province to express any opinion upon the reasonableness of this great innovation. It must be conceded that there were not wanting strong and justifiable motives for its enactment, and it is sufficient for those

whose duty it is to execute it, that Congress have seen fit to adopt it.

But it may, I think, well be supposed, that in deference to the spirit of the great principle of natural justice and constitutional law, which forbids the enactment of *ex post facto* laws, it was intentionally limited to cases of escape from servitude, thereafter to occur; and this inference, I am of opinion, is rather strengthened than weakened by the retroactive phraseology employed in the 6th section. The liability of this provision to abuse, is too obvious to escape notice, and it is worthy of observation, that in the present case, as it appears by the record of the Kentucky Court, instead of requiring the personal attendance of the witnesses of the claimant, the Court saw fit, in the discharge of the grave and responsible duty imposed upon it by the act, to receive affidavits, and to act upon them alone, although the deponents are described as residents of the city of Louisville, where the Court was held. It may well be that these witnesses were credible persons, able, from their own knowledge, to attest to all the facts requisite fully to warrant the decisions of the Court, and that a careful cross-examination would have elicited no other facts favorable to the petitioner; but conceding that the evidence before the Court might lawfully be held by it to constitute the "satisfactory proof" required by the act, the opposite course of procedure would, to say the least, have been more consonant with the established, and, as I had supposed, universally recognized principles of enlightened jurisprudence. I am, therefore, also of opinion, that it is my duty to apply to this enactment the same rule of construction that is applicable to penal statutes. "It was," says Professor Christian, "one of the laws of the twelve tables of Rome, that whenever there was a question between liberty and slavery, the presumption should be on the side of liberty. This excellent principle our law has adopted, in the construction of penal statutes; for whenever any ambiguity arises in a statute, introducing a new penalty or punishment, the decision shall be on the side of lenity and mercy; or in favor of natural right and liberty; or, in other words, the decision shall be according to the strict letter in favor of the subject. And though the Judges, in such cases, may frequently raise and solve difficulties contrary to the intention of the Legislature, yet no further inconvenience can result, than that the law remains as it was before the statute.

And it is more consonant to principles of liberty, that the Judge should acquit whom the legislator intended to punish, than that he should punish whom the legislator intended to discharge with impunity." (1 Black. Comm. 88, note 19.)

The result of this examination then is, that though the evidence on which alone the commissioner founded his adjudication, would have been sufficient and conclusive in a case arising after the passage of the act, it was wholly inapplicable to a case like the present, arising before the passage of the act. In other words, as appears on the face of the certificate itself, the adjudication was made without evidence, and the only question is, whether this great error, arising, I have no doubt, from inadvertence, can be corrected on *habeas corpus*. I think it may, and that it is my duty to do it. If, as it has been said, "A good warrant is a good cause of detention," the converse of the proposition is not less true. I shall accordingly allow the writ, but it must be made returnable before me at the Court-house, in Buffalo, at two o'clock, P. M., to-morrow.

[From the Western Law Journal, Sept. 1851.]

Court of Common Pleas, for Hamilton County, Ohio.

Before the Hon. Robert B. Warden, President Judge.

Frances Wright D'Arusmont *v.* William Phiquepal D'Arusmont, and others.

Divorce — Alimony — Conflict of Laws — French Code — Allowance pendente lite.

T. Walker and W. Y. Gholson, appeared for the complainant. M. H. Tilden, for the respondents.

This was a motion made for an allowance, during the pendency of a suit in chancery, to enable the complainant to carry on the suit, and at the same time have a comfortable subsistence; and, also, for an injunction and receiver.

At the time of filing this bill the complainant was a married woman, whose domicil was in Tennessee. She has since been divorced by a decree of the proper Court of that State, as is shown by her supplemental bill, on the ground of abandonment by her husband, and gross neglect of duty.

In her original bill, she claimed the interference of this Court, as a Court of Equity, on the following grounds:

There was a large property (some $80,000 or more) situated in this county, which her husband had settled in trust, without her previous knowledge or consent; which property was all originally hers, or the avails of what was originally hers; but which had passed into the name of her husband, before creating the trust. This property consists of loans on bond and mortgage, and of real estate purchased in foreclosing mortgages.

Being a resident of Tennessee, she could not seek her divorce here; and she was advised, that a decree of divorce and alimony there could only affect property there situated.

Therefore, to prevent the property here from being placed further beyond her reach than it already was, and to make it amenable to such rights as she might establish, notwithstanding the trust created by her husband, she filed this bill, claiming this property, or some part thereof, as equitably hers, and praying for an injunction, receiver, and general relief.

In support of this claim, she alleges that the parties were married in France, in 1831, under the French law, by a French officer, in the presence of French witnesses, (of whom General Lafayette was one,) and with reference to a French domicil; wherefore her proprietary rights are to be determined by the French law, although there was no antenuptial contract, inasmuch as all the property, wherever situated, came from her, he never having brought to the marriage, or since earned, a single dollar; although, from her confidence in his honor, she allowed him to change the investments to his own name.

She further alleges, that in 1847, her husband, and their daughter, without any just cause, abandoned her in Paris, came to this country, arranged a settlement of the property here in trust, without her previous knowledge or consent, and have ever since lived separate from her, and refused all intercourse with her.

That, in order to coerce her to execute certain deeds of settlement; first, of an estate in Dundee, Scotland, inherited after her marriage; and, secondly, of an estate in Tennessee, known as the Nashoba estate, purchased by her before marriage, and still standing in her name; the deed of trust made her execution of these deeds of settlement a

condition of receiving any benefit under the deed of trust, and that under this coercion, and in misapprehension of her legal rights, she executed the required conveyances.

That the deed of the Tennessee property is not duly executed according to the laws of Tennessee; and has not been recorded there, but remains in her possession, subject to the order of the Court.

That she is now in a condition of almost utter destitution, although the entire estate, here and elsewhere, is ample to support all, being not worth less than $150,000.

That if her rights are not to be governed by the law of France, she is entitled to relief under the law of Ohio, and to be restored to some part, or all of the property which she brought to the marriage.

The bill does not call for an answer under oath, but an oath is volunteered. The case is not ready for final hearing, but affidavits have been filed by the complainant in support of some of her principal allegations. And the main question for the Court now was, Whether an allowance shall be ordered for counsel fees and subsistence, until a final hearing.

The motion for a receiver was waived; and an injunction, to the extent asked, was not resisted. The only question, therefore, was as to the allowance *pendente lite.*

And on this question, the rule was claimed to be this:

Whenever a married woman has probable cause to litigate with her husband, as to property in contest between them, and has not the means of supporting herself in the meantime, and carrying on the litigation, a Court of Equity, will order an allowance to be made to her, out of the contested fund, for both these purposes.

The reason is, the necessity of the case. She cannot sue *in forma pauperis;* and without such allowance she cannot have her rights judicially investigated.

Unless, then, upon the present showing, the Court is satisfied, beyond any reasonable doubt, that the complainant has not even a probable claim to relief in equity, an order will be made for the allowance now moved for. The case of *Snyder* v. *Snyder,* (3 Barbour's S. C. Rep. 624,) lays down the rule in as broad terms as this.

In support of complainant's claim her counsel took the following positions:

1. This was a French marriage.

It was solemnized in Paris, before the French consti-

tuted authorities, and according to their forms, which could not have been done, unless one at least of the parties had his domicil there. (See Code Nap. art. 63 and 165.) It was the husband's domicil of origin, and if he ever acquired a domicil in the United States he lost it when he went to France before the marriage. A vague intention to return to the United States without reference to any specific time or place of sojourn, would not affect the French domicil. But the *act of marriage* states that both parties were domiciliated there, and this is conclusive.

Hence the rights of the parties are to be determined by the law of France.

2. The property in possession of the parties at the time of marriage could only be affected by express contract, or by operation of law. If affected by neither, the rights remained the same as before; if affected by either, then the contract or the law would show the nature and extent of the change of the right of property; and in any controversy as to that right, the contract or the law, as the case may be, must govern. Now, a removal of the persons or property to another jurisdiction could not change rights of property thus vested. As to property afterwards acquired in a new residence, it may be different; the law of the jurisdiction in which it is acquired may govern that, and the distinction has accordingly been taken. But in this case, we contend there has been no such change of residence, or at any rate no new acquisition of property. (See Meigs' Rep. 342; Ib. 620; Story's Confl. Laws, § 48, 143–189, 191; 8 Paige, 261–265; 7 B. Monroe, 133; 4 Barbour's S. C. Rep. 295; 4 Ib. 504, 518; 1 Woodb. & Minot, 7; 19 Maine, 293, 301; 3 Ves. 199, note; 8 Cranch, 253, 335; 3 Wheaton, 14; 5 Metcalf, 588; 1 Ib. 250.)

3. Under the French law, where there was no contract as to property, on a dissolution of the marriage (although there can now be no divorce, so as to enable the parties to marry again), the wife is entitled to be restored to all her property, or at least to half. (See Code Napoleon, art. 1387, 1393, 1400–1496; Story's Confl. Laws, § 130.)

4. This Court will give full effect to the divorce in Tennessee, as much as if it had been granted in this State, and the decree will be conclusive of the facts found. (See 7 Ohio Rep., Pt. II., 238; 10 Ib. 27; 2 Blackford, 407; Page on Divorce, 356.)

5. There can be no doubt of the jurisdiction of this Court, to carry out the law of France as nearly as may be. (See 8 Paige, 261, 270; 3 Johns. Ch. Rep. 190, 211; 6 Barbour's S. C. 498; 7 Ib. 226; 2 Sandford's Ch. Rep. 33.)

6. But without reference to the French law, this Court can grant relief, in the shape of alimony under the Ohio statutes. (See Swan's Stat. 294, § 7; 44 Ohio L. 115.) For although a previous residence is necessary in applying for a divorce, it is not in applying for alimony.

7. There is also a general chancery jurisdiction in such cases, independent of that conferred by statute. (See 1 Smedes & Marsh. Ch. Rep. 51, 65; 4 Hen. & Munf. 507; 4 Randolph, 662; 2 B. Monroe, 142; 3 Dana, 28; 4 Barbour's S. C. Rep. 297; 1 Johns. Ch. Rep. 364.)

8. In order to decree alimony, *pendente lite*, it is only necessary to present a probable case, one deserving of investigation. (1 Johns. Ch. Rep. 109; 1 Ib. 364; 1 Barbour, S. C. 430; 8 B. Monroe, 496; 2 Ib. 145; 3 Barbour's S. C. Rep. 624.)

9. As to the deed of trust of September 17, 1847, it is void because executed with a view to a separation. (See Code Napoleon, art. 1443; 7 Yerger, 283; 7 B. Monroe, 133; 4 Dana, 141; 4 Johns. Ch. Rep. 501; 4 Paige, 516; 5 Ib. 509.)

10. The two deeds of the Dundee property and of the Nashoba property, are void because procured by coercion, and under a misapprehension of legal rights. (See 11 Ohio, 480, 488; 2 Barbour, Ch. Rep. 500; 9 Conn. 114; 7 Paige, 137; 4 Ohio, 358, 365.)

11. The deed of the Nashoba property is also void, on account of defective execution. It has no seal or acknowledgment according to the law of Tennessee. (1 Yerger, 429.)

12. This deed is also rightfully withheld by complainant in self-defence. But she has now placed it in the custody of the Court, and subject to the final decree in this case.

Counsel for respondents took the following positions:

1. Authorities cited against the motion for injunction and receiver. 5 Daniel's Ch. Pr. 407, 408, 410, 427, 429; 1 Smith, Ch. Pr. 560, 595, 628, 629; 2 Story's Eq. Jurisp. § 907, 908; *King* v. *King*, 6 Vesey, 172; *Leadworth* v. *Edwards*, 8 Vesey, 45; *Knight* v. *Duplesir*, 1 Ib.

324; *Harding* v. *Glenn*, 18 Ib. 281; *Howard* v. *Papera*, 1 Madd. R. 142.

2. *Allowance.* The defendants contended that an allowance could not be made, either, 1. As Alimony; or, 2. As an exercise of chancery jurisdiction.

I. *Alimony.* The defendants contended that an allowance of alimony was the enforcement of the merely conjugal, personal rights and duties of the married parties, and that the case, so far as their object was concerned, should be considered and decided as a distinct case, wholly independent of that made by the bill, addressed to the Court as a Court of Chancery: and that the Court could not decree alimony now, or at the hearing.

First. Because the Court had no jurisdiction; in support of which, the following reasons and authorities were adduced:

1. The petitioner had not acquired a year's residence as required by statute: and it was argued that there was no difference between a petition for divorce, and a petition for alimony alone. (Story on the Confl. of Laws, § 200, 203, 204, 214, 215, 216, 217, 218, 226, 230; Swan's Statutes, p. 294, sec. 7); *McCartly* v. *Decain*, (2 Russ. & Mylne, 614, 620); *Maguire* v. *Maguire*, (7 Dana, 186); *Person* v. *Person*, (2 Russ. & Mylne, 614); *Jackson* v. *Jackson*, (1 Johns. R. 431); *Piatt* v. *Piatt*, (9 Ohio Rep. 37.)

2. The petitioner, pending the proceedings here, had obtained a decree of divorce *a vinculo matrimonii*, in Tennessee; and was not now a wife, so as to be entitled, on principle and authority, to apply for alimony. And it was contended that the defence to these proceedings, furnished by that decree, operating like a defence, by way of plea *puis darrein continuance* at law, was equally conclusive under our statute, and upon general principle. *Piatt* v. *Piatt*, (9 Ohio Rep. 37); *Cooper* v. *Cooper*, (Part 2, Ohio Rep. vol. 7, p. 238); *Cooke* v. *Cooke*, (1 Barb. Ch. Rep. 639); *Meehan* v. *Meehan*, (2 Barb. Sup. Ct. Rep. 377); *Dean* v. *Richmond*, (5 Pick. 461); and citing also 4 Metcalf, (Mass.) R. 303; 4 Rawle, Rep. (Penn.) 182; 2 Serg. & Rawle, 491; 4 Mass. R. 99; 2 Knapp. Rep. 226; 1 Blackf. (Ind.) Rep. 364; 2 Vesey, Jr., 365; 1 Smedes & Marsh. Ch. Rep. (Miss.) 51.

But if the Court should be of opinion that it had jurisdiction, then it was contended that a case was not made for its exercise.

1. Because the petitioner appeared to have the means of support, independently of the husband. This point was argued on the evidence, and the following authorities; *Worden* v. *Worden*, (3 Edw. N. Y. Ch. Rep. 387); *Logan* v. *Logan*, (2 B. Mon. 149); *Butler* v. *Butler*, (4 Litt. 205); *Bartlett* v. *Bartlett*, (4 Porter's Rep. 387.)

2. Because the separation of the parties was by the act of the petitioner; and it did not appear, and was denied, that she was abandoned by her husband, and it was denied also that the decree in Tennessee was evidence to prove an abandonment. *Finley* v. *Finley*, (9 Dana, Rep. 52); *Butler* v. *Butler*, (4 Litt. 205.)

3. Because, as the sole object of the suit was alimony, it was the duty of the Court to inquire whether the petitioner could obtain a decree at the hearing, and to refuse an allowance if she was the party in fault; although it was admitted that if she were seeking a divorce also, the allowance might, in the exercise of the discretion of the Court, be made, even if it seemed probable that she would fail at the hearing. And it was contended that, in point of fact, she was the party in fault. *Bissell* v. *Bissell*, (1 Barb. Sup. Ct. Rep. 430; 1 Ib. 64; 3 Ib. 624; 9 Dana, 52; 7 B. Mon. 424; 8 Ib. 124.)

Second. It was claimed that the Court, as a Court of Chancery, could not allow alimony in any case.

1. The grant of express power to allow alimony in certain cases, is a prohibition against the exercise of the same power in other cases; and if any impediment exists to its exercise, under the statute, that obstacle cannot be removed by *supposing* the case merely to appertain to the chancery jurisdiction of the Court.

2. Alimony is not a subject of chancery jurisdiction. *Olin* v. *Hungerford*, (10 Ohio Rep. 270; 1 Story, Eq. Jurisp. § 1422, 1423; 2 Chitty Gen. Pr. 435, 462; 1 Fonb. Eq. book 1, chap. 2, sec. 6, p. 98; 1 Bl. Com. 441); *Prather* v. *Prather*, (4 Dessaus. Rep. 33); *Julieneaux* v. *Julieneaux*, (2 Ib. 45.)

3. Considering the case apart from the demands of the petitioner, as wife, and as involving only her rights as the claimant of the property in controversy, it was denied by the defendant, that the Court had any power, *pendente lite*, to order money to be paid to one of the adverse parties by the other. And if this could be done in any case, it could only be properly done while the relation of husband and

wife subsisted between the parties, and in a case in which the Court should at the same time pronounce upon the rights of the parties. It was denied that the complainant had any claim to relief in a Court of Equity; and the argument, on this part of the case, consisted in a reply to the grounds taken by the counsel for the petitioner, which was as follows:

I. It was claimed by the counsel for the complainant, that the case should be governed by the French law; and that by that she was entitled, on a dissolution of the marriage, to a restoration of all the property owned by her at the time of the marriage. To which the defendants answered:

1. That the trust-deed of September 17, 1847, was, so far as the daughter was concerned, a proper and valid exercise, under the French law, of the administrative powers of the husband.

2. That, under that law, the property of the community could not be divided, until the community should, by some means, be lawfully dissolved, and that such dissolution had not taken place. That the divorce in Tennessee did not work a dissolution, because, when the marriage was celebrated, the laws of France did not authorize a divorce; that the cause for which that divorce was professedly pronounced, was not such as would lead to a judicial separation of persons under the French code, and that, in point of fact, no such cause was made out by the proof.

3. And that even if the community, claimed to have existed under the French code, could be considered as dissolved, so that the property of the parties could be divided, the mode of division would be by moieties.

II. It was denied, however, by the defendants, that the laws of the place of the marriage could be applied.

1. Because the law of the place of the marriage is a real (and not a personal) law, having no extra-territorial force, and not forming a part of the contract. (Story's Confl. L. § 168, 171, 175, 176, 186); *Ordionaux* v. *Ray*, (2 Sandf. Ch. Rep. 33); *Lebritton* v. *Nouchet*, (3 Martin, La. Rep. 60); *Saul* v. *His Creditors*, (17 Martin, Rep. 598); *Beard* v. *Bayse*, (7 B. Mon. Rep. 13.)

2. Because the actual domicil of the parties, at the time of the marriage, was not in France, but in the United States, in contemplation of which, the marriage, which was celebrated while the parties were *in transitu*, was contracted. (Story on Confl. of Laws, § 41, 44, 45, 46, 47,

48, 175, 176; Ford's creditors, 14 Martin's Rep. 578; Story on Confl. of L. § 160–163, 166, 168, 174, 192–194, 196–198.)

3. The parties, after the marriage, removed to the State of Ohio, and during their residence there, by mutual agreement, vested their property in the husband. (Story's Confl. L. § 55, 56, 59, 69, 102, 103); *Male* v. *Roberts*, (3 Esp. Rep. 63); *Thompson* v. *Ketcham*, (8 John. Rep. 189.)

III. It was claimed by the counsel for the complainant, that she was entitled to relief, under the act to amend the act in relation to divorce and alimony, passed March 2, 1846. (Ohio Laws, vol. 44, p. 115.) This proposition was denied, on the ground:

1. That the case made could not be brought within the provisions of that act;

2. That the act was not in terms retrospective; and,

3. That if the act was intended to be retrospective, it was void, because property rights, acquired by marriage, are protected by the provision contained in the Federal Constitution, against State legislation, to impair the obligation of contracts. *Lefevre* v. *Lefevre*, (10 Barr, Penn. Rep. 505); *McLellan* v. *Nelson*, (27 Maine, 129); *Swift* v. *Lace*, (27 Ib. 285); *Snyder* v. *Snyder*, (3 Barb. Sup. C. Rep. 621); *Holmes* v. *Holmes*, (4 Ib. 295.)

IV. The general equity of the case was denied on all the grounds claimed by complainant.

1. As to the property embraced by the trust-deed; it was contended that this property belonged to the husband, in his marital right, having been reduced to possession by him, and that it could not be subjected to the equity of the wife to a settlement. *Udall* v. *Kenney et al.* (5 Johns. Ch. Rep. 464;) *Same case*, (3 Cowen, Rep. 590); *Huber* v. *Huber*, (10 Ohio Rep. 371); *Ramsdell* v. *Craighill*, (9 Ib. 197); *Dixon* v. *Dixon*, (18 Ib. 113); *Bogue* v. *Krebs*, (6 Harr. & John. 37,) and numerous other cases.

2. It was denied that, in point of fact, the marital rights of the husband were acquired in a manner which would enable the Court to raise a trust in favor of complainant.

3. And the evidence was reviewed, to show that none of the allegations of fraud, made by the complainant, were sustained.

4. And it was contended that the settlement of the property of the parties, by and in pursuance of the trust-deed, was in itself just and reasonable, and substantially in pur-

suance of their understanding long previously existing; and especially that it was essentially such as had been desired by the complainant herself.

Judge WARDEN delivered the following opinion:

"This is a singular case. The record will embody the history of two lives, the portraiture of at least two marked and interesting characters, and the story of many important events. The bill, the answers, the correspondence, are a volume of moral lessons: the argument would make a book, a valuable book, of equity jurisprudence.

"I shall never forget those mornings in the law library, those arguments, those studies, those eloquent appeals to enlightened thought and exalted feeling. All the questions were held up to view in every possible light; never, indeed, were such questions more clearly elucidated. And if, in the course of this opinion, many of the points in that almost perfect argument of counsel, on both sides, are really untouched, and apparently unnoticed, it will certainly not be because any one of them has failed to engage my attention.

"I have carefully considered all the arguments of counsel, and earnestly endeavored to do justice between these parties.

"And now, after advisement, which has occupied every moment of the time left me by the pressure of public duties, and the painful interruptions of domestic afflictions, I venture to pronounce the opinion I have formed.

"The relief asked by complainant is, I think, in the nature of alimony. At least, the structure of the bill is such, that whatever relief may be appropriate, the pleader evidently contemplates that relief, as a consequence of the divorce, which the petitioner declared her intention to seek in the proper Court, pending the proceedings in this.

"Regarding the bill as one for alimony, the counsel for respondent has ably and ingeniously argued that this Court is without jurisdiction, to allow such relief to a resident of Tennessee. We do not so understand the law. There are good reasons why it should not be so construed. First, because such a strict and restrictive construction would confer on this Court a crippled jurisdiction, and ought only to be adopted upon conviction that the language will not bear a construction more favorable to the complete administration of justice, and more harmonious with the objects of the legislation to which it belongs.

"We are inclined to the opinion that alimony, in Ohio,

can only be allowed for the causes pointed out in the statute; but if we resort to the strict construction adopted by counsel, we shall not have reason to restrict the remedy as claimed. The language so construed, occurs in the seventh section of the Divorce Act. What is meant by 'cases aforesaid?' If we do not apply it to the *first* section, to which shall it apply? To the second? That provides for applications for *divorce.* Now, how can a case in which the wife asks for alimony *alone,* be a 'case aforesaid' (in which divorce is asked)? Nor is the application of the phrase more appropriate to the *sixth* section, which provides for residence as to alimony. In fact, every other section of the statute, except the *first,* relates to applications for divorces, or the acts and proceedings of Courts upon them; and although that first section defines the causes of divorce, it is the only one which can furnish the 'cases aforesaid,' in which it can be said that the petitioner prays for alimony *alone.* And if we go to the next section, which provides 'that the wife shall file her petition under the provisions of this act, praying for a divorce from her husband, the residence of her husband shall not be so construed as to preclude her from any of the provisions of this act,' we shall find additional suggestions for doubting the correctness of the restrictive construction. It is claimed that the common rule, that the residence of the wife follows that of the husband, applies to a case of divorce, and yet that the destitute wife cannot follow her husband into the Courts, where alone her wants can be supplied. I think the operation of the words 'cases aforesaid,' is to furnish the Courts with the *causes* for which alimony may be allowed.

"And I am the more inclined to such an opinion, as regarding the illustration of the difficulty attending the opposite doctrine yielded by the very case before us. The complainant declares that she will, pending these proceedings, seek a divorce in Tennessee, and will thereupon ask such decree as to her rights, as she would be entitled to under the French code; that is, she asks alimony, and, as the rule for granting that, she appeals to the French code. Treating the case as one for alimony, it is clear that she can only have full relief in this Court; and it would be strange, if she must first have her decree for alimony in Tennessee, and then come into a Court of law or chancery in Ohio, for the purpose of enforcing that decree.

"But it is next objected, that the complainant cannot

have alimony, because she is no longer a married woman. This is not the law in Ohio, notwithstanding the former opinion of complainant's counsel. Strictly, it is not law anywhere; for the sentence of divorce always precedes that of alimony, when both are sought by the same process. It is enough, however, that when the complainant filed her bill, she *was* a married woman, and that she is now merely asking a clear legal consequence of a divorce, obtained, pending these very proceedings, and with strict reference to them.

"The next objection is, that if the jurisdiction is established, the complainant has no merits. Let us examine this part of the case.

"As I have already said, or intimated, if the complainant has made out none of the causes, specified in the first section of the divorce act, she can have no relief in the nature of alimony, using that term according to the common definition, and excluding, for the present, all idea of alimony, *pendente lite.*

"But I am clearly of opinion that she has sufficiently and satisfactorily proved at least *one* of those causes. The words 'gross neglect of duty,' are not employed, but such is the substance of the allegation, and such is the effect of the decree, divorcing the parties, pronounced by the Tennessee Courts. True, we are here met with the difficulty, that the French law does not allow divorces. But the complainant does not lose her rights under the French law, because she has been divorced: all that can be said is, that the divorce is not, *as* a divorce, a title to such a restoration of property as claimed by her. In her bill, she states cause for divorce, substantially; and she there intimates that when she shall have acquired the right to sue in a Tennessee Court for such relief, she will there ask for a divorce. Having been divorced pending this proceeding, she now demands alimony, and claims as such alimony the enforcement of her rights under the French code. Now, her claims under the French code depend upon the question, whether there has been such a cause for the divorce in Tennessee, as would, under the French code, have supported a divorce for cause determinate. So that, although she may be entitled to alimony, she may still not be entitled to such alimony as would defeat the operation of the French law, if we shall find that the law of the place of the marriage contract governs us in this case. Let us ex-

amine, then, whether the law of Ohio, or the law of France, is to furnish us with the rules for ascertaining these parties' rights.

"In the condition in which I am now placed, I cannot so fully state the reasons for the opinion I have formed on this subject, as in other circumstances I would be disposed to do. Without reviewing the authorities in this place, and confessing that attentive consideration of the case cited has not entirely relieved my mind of doubt, I venture to state these propositions.

"There is a distinction between the construction of ordinary contracts and that of the marriage contract, so far as property is concerned.

"In either case, however, the *intention* of the parties ought to govern in any suit between the parties alone, or between them and such as have not the protection given to innocent purchasers or creditors, or the like.

"Where the parties agree that, notwithstanding any change of residence, the property acquisitions shall be governed by the laws of the State where they marry, that agreement ought to be respected in the settlement of all questions between the parties, *and in all Courts*, unless the rights of innocent creditors or purchasers would thereby be affected, or unless such would contravene the laws or policy of the State in which such relief is sought.

"The parties may so agree, not only by written articles, but by merely verbal or implied contract.

"In the absence of such written articles, verbal agreement, or implied contract, the mere fact of marrying in one country furnishes no presumption that the parties agree to govern all their property acquisitions by the law of that place, irrespective of all changes of domicil.

"Upon the question of fact, whether there *was* any such agreement, it is admitted that there were no written articles of such a contract, and, under the rules of law which I understood to govern allegations and denials in a chancery cause, I have no proof, which can now be considered, that the parties had any agreement on the subject. It is *possible*, however, that the complainant may prove what she claims on this subject, and the only effect of its being for the present *un*proved, is to leave for future determination the question whether, supposing the plaintiff entitled to alimony, the French code or the common law is to be regarded in determining the relations of the parties as to

their property. In this state of uncertainty I find it unnecessary to express any opinion I may have formed as to the settlement of property questions under the foreign law, in cases like this.

"I am equally relieved in the question, whether the complainant has merits requiring the allowance of alimony as a consequence of her divorce. The decree of the Tennessee Court finds such facts as prove the existence of one of the causes for alimony known to our law, viz., *gross neglect of duty*. Happy I esteem myself, in being thus discharged of the most delicate and difficult task that could be imposed upon any Court.

"We have, as I have said, been called upon in this strange case to review the history of two lives, and the opening of another. Two lives that are closing in suffering and sorrow; another, the happiness once of the others, the solicitude now of both! We have been looking upon a fearful picture, and I breathe freely once more, when I become certain that it is not my painful duty to copy such a portraiture of broken ambition, disappointed hope, and lost happiness. I congratulate myself that I am released from the responsibility of saying *what* demon it was that turned all this love to hate, and their home into hell; I dare not say, if I had to meet such a responsibility, whether the picture painted by either party, would be such a one as I should draw, in the light supplied by the history of those sorrows, contained in the evidence before me.

"I hasten to dispose of the remaining questions. It is said the complainant, though she may in the final decree be entitled to alimony, ought not to have any allowance pending these proceedings, because she is now freed from the disability of coverture. We do not think that a good reason for refusing the allowance; she was married when she filed the bill; she is aged and infirm; she is as much entitled to support and maintenance now as she will be on the final hearing. It is further objected to the allowance, *pendente lite*, that she has already the means of living decently and comfortably. We do not find so from the testimony. I am of opinion, that looking to all the circumstances of the case, I could not do better than to direct payments analogous to those provided in the trust-deed. The respondents can hardly object to such a course, for such in substance is their own arrangement;

and the only difficulty suggested is that the trustee, *as such*, and upon his own responsibility, cannot make payment until the complainant surrenders the deed to the Nashoba estate. From this difficulty, the order here made will relieve him, for it will be as *alimony*, and not as money paid under the trust-deed, that he will deliver to the complainant sums equal to her provision in the trust-deed.

"We here intimate no opinion as to the force of the trust-deed. The parties stand, in allegations and proof, so opposed, that it would be wrong now to settle that question. Nor shall I make any order, for the present, as to the delivery of the Nashoba deed; that will depend upon the disposition of the trust-deed.

"I have not found it necessary to decide upon the case, considered as one in which the husband is trustee for his wife. That is also a part of the case in which the bill and answer are at issue, and the proof does not yet satisfactorily appear. But here also the complainant has probable cause to litigate, and here also I find reasons for making such an allowance as I have already intimated I should direct.

"Briefly, then, I am satisfied that this Court has jurisdiction of the case, first, as one of alimony; and, secondly, as one of the nature just indicated. I am further satisfied that she has probable cause to litigate with her husband on either of these questions, and I allow her alimony, *pendente lite*, and till further order, in sums analogous to those provided in the trust-deed; thus relieving the trustee from any possible difficulty of paying *under that deed*, until he has secured the Nashoba conveyance, and postponing the determination of all other questions until full proof and further advisement.

"I cannot see any necessity for either injunction or receiver at present, except so far as counsel appear to have agreed.

"An order may be drawn for my signature in accordance with this opinion."

NOTE.—The Court ordered $800 to be paid to complainant now; one third of the income of the property here to be paid quarterly hereafter, and a counsel fee of $800 on each side.

Abstracts of Recent American Decisions.

Supreme Judicial Court of Massachusetts, Berkshire County, September Term, 1851.

Equity — Law of Mines — Tenancy in Common — Construction of Deed. Bill in equity, and prayer for special partition and an account. Both parties claimed under one Jared Lane, who owned an undivided three fourths of the premises in 1790. In that year, Lane conveyed to the grantors of defendants all the land he owned, "reserving the right to all the iron ore" in the premises. The plaintiffs claim under the reservation. The bill alleged that the remaining one fourth of the premises, together with one fourth of the ore, was in the defendants.

Held, that if A. and B. are tenants in common of Lane, one of them cannot convey a portion of the estate, by metes and bounds, to a stranger. He can only convey a portion of the estate, by conveying a fractional part of the whole. Neither can he convey his interest of the estate held in common, *reserving* a portion of it by metes and bounds The reservation in this case was of the whole iron ore in an undivided three fourths of the premises; so that the reservation was of a portion of the estate, bounded by the extent of the mine, and such a reservation is void upon the foregoing principles, and the deed of the land to the defendants' grantors, conveyed the whole estate notwithstanding the exceptions. The attempt to sever was void as against the co-tenants. Cases cited by the Court: *Bartlett* v. *Harlow*, (12 Mass. 348); *Varnum* v. *Abbott*, (12 Ib. 474); *Baldwin* v. *Whiting*, (13 Ib. 57); *Weld* v. *Oliver*, (21 Pick. 559); *Peabody* v. *Minot*, (24 Pick. 329). Bill dismissed. — *Adams et al.* v. *Briggs Iron Co.* B. R. Curtis and Wm. G. Bates for complainants. S. Bartlett and James D. Colt for defendants.

Insolvent Estates — Sale of Equity by Administrator — Administrator's Accounts — Appeal from Court of Probate. H S., administrator on the insolvent estate of one Gordon, had an order of sale of real estate of the deceased, for the payment of debts. He exposed the estate for sale, representing at the time of sale that it was subject to *one* mortgage, and a widow's dower. It subsequently appeared that there was an outstanding mortgage of $504 unknown to administrator and purchasers at the time of sale. The equity sold for $516. The administrator, by leave of Probate Court first had and obtained, charged the amount paid by him to redeem the other mortgage in his account, crediting the estate with the difference, to wit, $12.

Held — In this case, there is no pretence of fraud or collusion. The accounts of an administrator are within the control and supervision of the Probate Court, and mistakes and errors may be corrected, when discovered. The law requires honesty and fair dealing on the part of administrators. They may sell the equity, or offer the whole estate, they redeeming the incumbrances. Creditors are here not prejudiced. *Abby* v. *Fuller*, (8 Met. 36.) Appeal dismissed. — *Church et al. Appellants from Decree of Probate Court* v. *Hamblin Savage*. B. Palmer and I. Sumner for Appellants; C. N. Emerson for appellee.

Tender. Writ of Entry. The equity of B. Coles was sold on execution to the defendant in this action, a judgment creditor. Before the year

expired for its redemption, Coles transferred his right to redeem to Southworth (the plaintiff in this action) by deed duly executed, but not recorded, till after the expiration of the year. The year of redemption expired on the 27th of December, and on the 21th of December (which was the date of Cole's deed to plaintiff,) Southworth went to defendant's house, and was told he had gone to Connecticut. On the 26th of said December he went again, with witnesses, and took with him the amount due ($605) in specie. He was told by the family of defendant that he was still absent in Connecticut. Southworth exhibited his deed, and offered to pay the money to any person authorized to receive it. He was told there was no person, there, authorized to receive it, and he took the money away with him. At Nisi Prius it was left to the jury to say, whether the defendant fraudulently absented himself to avoid a tender, and they found that he did.

Held, that the tender was sufficient; that the fraudulent act of defendant excused any tender; that if defendant had been absent in good faith, still the tender was made in the only way it could be made. Also *held*, that the writ of entry was a proper form of action. — *Southworth* v. *Smith*. I. Sumner for plaintiff; C. N. Emerson for defendant.

Trespass — Ancient Deed — Boundaries — Construction. Plaintiff clalmed, under an ancient "Pitch" of common lands, made by one Root, the boundaries being as follows, "Commencing on the north line of the Indian line, thence east on said line." Defendant claimed under a more modern deed of one Sage, with this description: "East sixty rods, to a monument of stones on the Indian line, so called, thence east on the Indian line." Plaintiff claimed nothing south of the Indian line, the defendant nothing north of the Indian line. The Indians, by their ancient Reserve, described their line as a due east and west line, and the defendant insisted that such was the true course. On the other hand, the plaintiff claimed, and offered evidence to show that, by reputation, ancient tradition, and the deeds and grants of ancient co-terminous proprietors, the line of the reserve did not run due east and west, but varied therefrom five and a half degrees.

Held, that the evidence of tradition, reputation and co-terminous grants, was rightly admitted, and it was a proper question for the jury; that however the line of the reserve was originally laid, it was still competent for the jury to find that it had been practically located and fixed by co-terminous proprietors, in a different direction, and that long established grants should not be disturbed by a different rule of construction, and that great embarrassment and confusion would result from the construction claimed by defendant. *Richwell* v. *Adams*, (6 Wend. 467); *Jackson* v. *McCall*, (10 Johns. 377.) Judgment for plaintiff. — *Kellogg* v. *Smith*. Porter and Chamberlain for plaintiff. I. Sumner, and C. N. Emerson for defendant.

Construction of Deed — Personal Mortgage — Sale. Trespass against an Officer. Plaintiff claimed certain personal property, by virtue of a mortgage duly recorded. Defendant claimed, by virtue of an attachment on a writ. The mortgage described the property as, "All the staves I have in Monterey, the same I had of Moses Fargo." It appeared the mortgagor had no staves in Monterey, but he did purchase a quantity of said Fargo, and at the time of the mortgage they were in Sandisfield, near the line of Monterey. The mortgage was made before the staves were all delivered Fargo, and before they were all paid for; the bargain being that they should be paid for, or security given, before they should be the property of vendee.

Held, that the property was sufficiently described if they could be identified, notwithstanding the erroneous description; but as an act was to be done by mortgagor, as a condition precedent to the completion of

the sale, the mortgagor had no property which he could convey. Judgment for defendant. — *Pettis* v. *Kellogg*. I. Sumner for plaintiff. C. N. Emerson for defendant.

Trespass on the Case — Master and Servant. Case for injury to plaintiff's land, by carrying away soil, stones, &c. Defendant managed his farm through an agent, who passed over on to plaintiff's land, contrary to the directions of the principal or master, and without his knowledge, and did the acts complained of: *Held*, that if the acts done were within the general scope of the master's business, although contrary to his orders, the master is liable, on the distinct and familiar ground of "*respondeat superior*." The master is not the less responsible, although the servant disobeys his orders, if the act done is in furtherance of the general employment. In case of inevitable accident no one is responsible, but here it was not inevitable. It was contrary to the master's orders, which implies a knowledge on the part of the servant of the wrongful character of the act. If the act is manifestly wilful and malicious, then the master would not be liable Judgment for plaintiff. — *Southwick* v. *Estes*. T. Robinson, for plaintiff. H. L. Dawes, for defendant.

Petition for Certiorari. The grounds set up by petitioners were, that a road was laid out by respondents, on an appeal from the decision of the selectmen of Monterey (who had refused to act in the premises) as a town road, and that these objections existed, among others, to the action of the respondents. —

1. The projected road extended to the adjoining town of New Marlborough, and it should be laid as a county road, at the expense of the county.

2. The respondents had no jurisdiction under the statute.

3. The respondents had not caused to be erected the permanent bounds provided by Stat. 1848, ch. 192.

4. The location of the road was made to depend upon the condition, that the town of New Marlborough should build a road within their own limits, to meet this.

5. *S. N.*, one of the commissioners, was an inhabitant of New Marlborough, and was incapacitated from acting on the original petition.

Held, that no sufficient ground had been shown for the certiorari. It is competent for county commissioners to lay out roads *in* a town, or from town to town; local ways may be highways or town ways. The question of discretion is vested in selectmen and commissioners. The other objections are not well founded. The statute of 1848 is merely directory. Petition dismissed. — *Inhabitants of Monterey* v. *County Commissioners*. Jno. Branning, for petitioners. I. Sumner, for respondents.

Promissory Notes — Rights of Indorsers — Parol Evidence. Assumpsit. Plaintiff was the first indorser in blank, upon a note, and the defendant was the third. This action was brought for contribution (the plaintiff having been obliged to pay the note) on a parol agreement made between the parties at the time of the indorsements, that they would, as between themselves, be held as joint sureties. In the Common Pleas it was ruled, that the action could not be maintained, being contrary to the rule of law excluding parol evidence, to control the legal obligations of indorsers.

Held, that the evidence was perfectly competent. There is no difference in principle between a case of this character, and an action between the joint makers of a note. *Harris* v. *Brooks*, (21 Pick. 195.) New trial ordered. — *Weston* v. *Chamberlain*. E. Merwin for plaintiff. Rockwell and Colt for defendant.

Trustee Process — Officer's return. Appeal from decision of C. C. Pleas, charging defendants' trustee on *scire facias*. It was objected in

behalf of the trustee, that the service of the process was made on a ticket clerk of supposed trustees, and not on the disbursing officer of the corporation. The officer returned that he had made personal service upon the disbursing officer, on the 3d day of February, 1850. On the 8th of said February, the disbursing officer of the corporation passed along the road, and paid the defendant in the original action, the amount due him.

Held, that the return of the officer was conclusive; that sufficient time had intervened between the service of the writ and the payment to defendant, to give due notice to the disbursing officer; the payment to defendant by trustees was in their own wrong, and they must be charged on their answer. — *Woodworth* v. *Ranzehousen & Western R. R. Co. Trustees.*

Action against Town — Illegal Tax. Assumpsit on a count of "Money had and received," to recover back a tax, &c., illegally assessed upon the defendant. It appeared that on the refusal of the defendant to pay the tax to the collector, a distress was made of his horse, which was sold for $62. The tax was $14, and the expenses of the sale $4. The balance of the money, after the costs of levy and expenses were paid, remained in the town treasury. The plaintiff urged that he might, in this form of action, recover the whole amount for which the distress sold, costs, &c. But the Court below instructed the jury, that the amount of the tax ($14) and interest, was all that could be recovered, and they returned their verdict for that sum, or about $18, and exception was taken.

Held, that the ruling of the Court was correct; that in this form of action all that could be recovered was the amount of the tax and interest. This was not the proper remedy for plaintiff to recover the damage he had sustained. *Dow* v. *First Parish in Sudbury*, (5 Met. 73.) — *Shaw* v. *Becket*. J. Rockwell for plaintiff. M. Wilcox for defendants.

Promissory Note — Notice of Protest. Assumpsit upon the following note: — "Housatonic, Sept. 14, 1848, $750. Three months after date we promise to pay to the order of Cutler Laflen, $750, at the American Exchange Bank, N. Y., value received. Signed, Housatonic Manuf. Co., P. D. Whitmore, agent." The note was indorsed by defendant, the payee. On the 16th of December, 1848, the following notice was made out by a notary: — "Mr. Cutler Laflen, Sir, please to take notice, that a promissory note, drawn by *P. D. Whitney*, agent, for $750, indorsed by you, is protested for non-payment, and the holders look to you for payment thereof. Your obedient servant, A. R. Rogers, N. Public." It was objected at the trial, that the notice did not properly describe or identify the note, and was not sufficient to charge the defendant (the indorser.)

Held, that the description and identity of the note was matter of fact for the jury. Here the only objection was the name of the agent; but the notice, in other respects, truly described the note. The jury were authorized to pass upon the question. — *Housatonic Bank* v. *Laflen*. J. E. Field for plaintiff. William G. Bates for defendant.

Conflict of Laws — Insolvent Law of Massachusetts. Plaintiff was a citizen of Connecticut, and brought assumpsit upon a note, alleging that he was the successor of payee of note. Defendant pleaded his discharge under the insolvent law of 1838, the plaintiff having failed to prove his claim under that law.

Held, this Court is bound by the decisions of the United States Courts. The discharge under the Insolvent Law of this State is no defence. The action is well brought by plaintiff, the successor of the payee. The case of *Woodbridge* v. *Allen*, (12 Met. 470,) cited and approved. — *Clark* v. *Hatch*. Porter and Chamberlain for plaintiff. J. E. Field for defendant.

Landlord and Tenant — Summary Process in Ejectment. Ejectment against a tenant under provisions of Rev. Statutes, ch. 104. A. sold to B. in fee. B. gave back a written stipulation, not amounting to a defeasance, that if A. would, within four years, repay to B. all sums of money which he should expend upon the place, and the purchase-money, he would reconvey. There was no obligation that B. should have the possession, but a collateral agreement that B., on certain terms, should be entitled to the possession. A became a tenant at will to B., who owned the estate. B. sold to the plaintiff within the four years. This was an alienation of the estate, &c.

Held, that the tenancy at will was terminated, and A. became a mere tenant at sufferance, having notice of the conveyance, and was not entitled to notice before the commencement of the process. The fact that the agreement was known to the present plaintiff, does not affect the question. It might have entirely changed the aspect of the case if A. had made a tender to B., according to the terms of the stipulation. A *bonâ fide* alienation of the landlord's estate puts an end to the tenancy at will. The question of notice has been much discussed since the cases of *Rising* v. *Stannard*, (17 Mass. 282); *Ellis* v. *Paige*, (1 Pick. 43; 2 Ib. 71, note.) When the privity of contract continues, the landlord must give the notice required by statute, if he would terminate the tenancy at will. The death of either party, or alienation in good faith, excuses the notice. Judgment for plaintiff on complaint. — *Howard* v. *Merriam*. Rockwell and Colt for plaintiff. T. A. Gold for defendant.

Plea of Discharge in Insolvency — Subsequent promise. Assumpsit on a promissory note. Defence, discharge as an insolvent debtor. Plaintiff replied a new promise after defendant's discharge. The evidence was, that a witness, as agent for plaintiff, went to defendant, and told him that "plaintiff wished the old note put in such shape, that she might get it at some time or other;" that thereupon defendant declined to give a new note, but at the same time said, "that he had always said, and still said, that plaintiff should have her pay." The jury, upon directions, returned a verdict for plaintiff. Defendant excepted to the ruling, on the ground, that the evidence does not amount to an express and unequivocal promise to pay the debt, and that the Court should have so directed the jury.

Held, that the words amounted to a promise, sufficiently express and unequivocal. Exceptions overruled. — *Pratt* v. *Russell*. J. D Colt for plaintiff. E. Merwin for defendant.

Miscellaneous Intelligence.

Death of Judge Woodbury. — We are grieved to be obliged to record the decease of the Hon. Levi Woodbury, one of the Associate Justices of the Supreme Court of the United States. He died at his residence in Portsmouth, N. H., on the 7th September, after a short illness, which his constitution, overworked by incessant judicial labor, could not resist. He was appointed a Justice of the Supreme Court in 1845, upon the death of Judge Story, and has since devoted himself unsparingly to the discharge of his official labors. His extended and ripe experience as a public man, and his exalted position as a Judge, make his death a public loss. We hope shortly to give our readers an extended notice of the life of this distinguished man and laborious Judge. We understand that the Hon. Robert Rantoul, Jr. will deliver an eulogy upon the deceased

before the city government of Portsmouth. In the various Courts of the United States that have been in session since his death, appropriate notice has been taken of the sad event. We give below the proceedings in the District Court of Massachusetts, and the remarks of the District Attorney and of his Honor, Judge Pitman, who presided in the absence of Judge Sprague, upon the opening of the Court.

After the grand jury were impanelled, the Hon. George Lunt addressed the Court — "May it please your Honor, I rise to make a motion, which no doubt the Court will agree with me to be suitable to the occasion. Within these few days it has pleased a wise and inscrutable Providence to remove, by death, the Hon. Levi Woodbury, Associate Justice of the Supreme Court of the United States. A more formal notice of this event would seem more appropriate at the session of the Circuit Court, now near at hand, of which he was the presiding Judge; but at this first session of a Court of the United States since his decease, I conceive it due to his official position and judicial character, to move an adjournment; and I do accordingly move that this Court be now adjourned, to such time as to your Honor may seem fitting."

To which motion Judge Pitman responded as follows: —

"The sad event which has so suddenly come upon us, has deprived us of a learned and able Judge, whose patience and strong desire to discharge faithfully the arduous duties of his station, caused him to forget what he owed to himself and family in the care of his health, and has no doubt hastened the event which we deplore.

"At an early age Judge Woodbury was appointed a Judge of the Supreme Court of New Hampshire, and though the youngest, was considered the most learned on the bench. This station he left in a few years for the more powerful attractions of political life. The eminence he has attained as a Judge may cause some to regret that his life had not been devoted to judicial duty.

"Having known him at an early period of his judicial life, and witnessed his ability, it was with much gratification that I welcomed him to the station he so lately filled, upon the death of his lamented predecessor.

"But how soon, alas! has he been removed in the midst of his usefulness, and all the hopes of his friends and the happiness of his family extinguished in the grave! How forcibly are we reminded, 'What shadows we are, and what shadows we pursue!'

"May 'the living lay it to heart.' Whilst we condole with a most afflicted family, and lament that so much learning, talent, and usefulness has been laid low in the dust, may the lessons of heavenly wisdom teach us so to 'number our days' that we may have the promise of the life that now is, and of that which is to come."

The Court was then adjourned for the day.

The Appointment of Mr. Curtis.—It is with extreme satisfaction that we announce the appointment of Mr. Benjamin R. Curtis, of Boston, to the place on the bench of the Supreme Court, made vacant by the death of Judge Woodbury. The fame of a great lawyer in our country, of one, we mean, who devotes himself exclusively to the practice of his profession, is local, and, to a certain extent, confined to the bar of his own State. Very few of our ablest lawyers enter the halls of Congress, or mingle at all in political strife; nor can professional men at our remove from Washington, attend frequently on the Supreme Court of the United States, without making too great a sacrifice of local business. Mr. Curtis, in particular, having but little taste for political life, and finding his whole services demanded by the business of our own Courts, has not acquired a national reputation in the manner of feebler men, who have appeared be-

fore the public in a different arena. Nor is there, in the history of his life, any thing striking or remarkable. Born in Watertown in 1809, he graduated at Harvard University in 1829. He passed his novitiate at the Law School in Cambridge, and in the office of Wells & Alvord in Greenfield. He was admitted to practice in 1832 or 1833, and commenced in Northfield. In 1834, he removed to Boston, and entered into a business arrangement with Charles P. Curtis, Esq , which has continued ever since. Mr. Curtis has been almost exclusively devoted to his profession, although he has found time for the amenities of literature and the pleasures of science, and has on two occasions been a member of our Legislature, in each instance, however, for the purpose of introducing a reform in our practice. He has never been seduced from his course, by the mistaken ambition for political honors and ephemeral fame. His ruling motive seems to have been a conscientious desire to perform the duties of his calling, and to perform them well. With a mind of great logical force, with great and varied learning in and out of the profession, and with habits of patient industry, his success at the bar has been very great. At a remarkably early age he stood in the foremost rank, and he has maintained his position by universal consent. His manner at the bar has always been peculiar. He never played the charlatan — he never pretended to more than he felt — he never tore a passion in tatters, and he never indulged in rhetorical display; and this last, not from want of ability, for he is said to be of a highly imaginative cast of mind, and well versed in literature, past and present; but because his good taste condemned the display, and no desire of temporary applause could induce him to "play to the pit." Calm, earnest, severely logical, always cool, he has pursued the even tenor of his way, and has been willing that the success of his efforts should answer for vulgar applause.

His mind is eminently of a judicial cast. For several years it has been well understood that various judicial stations, at different times, were open to him, and when the present vacancy occurred, the question at the bar and in this community was, whether he would accept the place, rather than whether it would be offered to him. In the whole course of our experience as journalists, we have never known a high judicial appointment which has given more entire satisfaction, in and out of the bar, than the present. This is high praise, and somewhat out of our usual course. But while we consider it a proud event in any man's history, that such an office should seek him at so early an age, we regard it as a most fortunate circumstance, that he has consented to devote the rest of his days to dispensing justice on the highest tribunal in the world.

Iowa Legal Inquisitor. — We have received the first number of a new law journal, published in Iowa. It is called the "Iowa Legal Inquisitor," and is to be "a monthly publication, devoted to the discussions of legal questions, and of decisions in the Supreme Court of Iowa." The object is a good one, and the appearance of the first number is, under the circumstances, highly creditable. We trust it will be sustained. We give below an extract from the Inquisitor, showing the plan of the work; also some remarks upon "the New Code of Iowa and its Effects."

"This paper is issued with much reluctance and at some pecuniary risk, but it was resolved upon after consultation with many attorneys who were largely engaged in practice in all parts of our State. All seemed to feel the necessity of such a paper, especially to give early publicity to the decisions of our Supreme Court in some authentic form for general circulation

"This necessity is made very apparent from the fact, that our Court 'of last resort,' holds its sessions in four different districts, and has

done so since A. D. 1847. Yet no decisions made since July, 1848, have been published. Although the decisions of the Supreme Court are the supreme law of the land, all of them made during the last three years are a sealed book to the members of the Bar and the people.

"And, again, we have a new code of a somewhat anomalous character, so condensed and general in its provisions, as to leave a vast many questions afloat upon the ocean of construction. It is vastly important that the construction of this code should be uniform and consistent throughout the State. It is supposed that this paper may promote this end, by furnishing a medium for an interchange of opinions among the Bar. The code should not be condemned without a fair trial, but its defects should be made known whenever discovered, and doubtful questions arising under it, should be propounded from time to time through this paper.

"No person has been found willing to start a law periodical in Iowa, and incur the expense of publication and the labor of editing the same. It was therefore determined to commence one on the association principle; to have every lawyer an editor, and a committee of the Bar at the place of publication to select matter of general interest for publication.

"This is an onerous duty, but men are to be found who will cheerfully discharge the duty for the general good. To sustain the paper, however, and make it interesting, every subscriber must feel an obligation on himself to contribute whatever he deems of public interest; either a report of decisions, criticism, treatise, or legal anecdote. The paper is to be furnished at cost; and the cost depends upon the number of subscribers."

Iowa — The New Code and its Effects — The first statute laws in force in Iowa, were those of Michigan. By the organic laws of Wisconsin, the laws of Michigan were extended over that Territory, until changed by the local Legislature. Whilst Iowa was a part of Wisconsin, there were several sessions of the Legislature, and many changes were made in the statutes of Michigan. By the organic law of Iowa, the laws in force in Wisconsin, at the time of the division, were extended over Iowa. The first session of the Legislature of Iowa attempted a compilation and revision of the laws. But finding their work incomplete, they stopped without fully repealing the laws of Michigan and Wisconsin which had been extended over her. The second session of the Legislature 1839–'40 continued to legislate upon the General Laws, and added quite a volume to the acts of the former year, but adjourned without completing their work of repeal.

At a special session of the Legislature held in July, 1840, the laws of Michigan and Wisconsin were finally repealed. The annual Legislatures continued to enact amendments, alterations and supplements, until the winters of 1843–'44, when a revision was attempted, which resulted in the Blue Book, sometimes called "*Phister's Code.*" The deplorable deficiency of this revision demanded continual alterations and amendments, which the Legislature *most cheerfully* attempted to make, until it was next thing to impossible to find what was, and what was not law. In 1846 the Constitution was adopted and a State Government formed. The Constitution continued the laws of the Territory in force that were not inconsistent with its provisions. The first Legislature of the State undertook to supply the deficiencies and adapt the Territorial laws to the Constitution. As might be expected, this was done in a very bungling manner. *The Legislature of* 1846–'47, attempting to reconcile "*Phister's Code,*" and the half dozen subsequent volumes of statutes with the constitution and machinery of a State government by a species of supplemental patch-work, at this day excite surprise that they got along at all.

At the special session of the Legislature of 1847–'48, an act was

passed, appointing Stephen Hempstead, Charles Mason and William G. Woodward commissioners, to report "*A Code of Laws.*"

This reference to the history of our Legislation appears necessary, in order correctly to comprehend the labor and difficulties that were presented to the commissioners, and to judge of the wisdom or expediency of their presenting an entire new code, changing the form of nearly all municipal organizations, and reversing many of the settled rules of the rights of persons and property. In the first place it must be remembered, that the Legislature of four different governments had within the space of fifteen years, to a greater or less extent, become the source of rights acquired, and in some degree fixed their peculiarities upon the laws in force, and that in the formation of a State Constitution, all these peculiarities had been overlooked. That instrument was formed upon great and fundamental principles, many of them considered as radical. The public mind in the formation of that instrument acted upon the principle of *utility and progress* — the largest liberty consistent with perfect equality and universal protection of the citizen — economy in the administration of justice, and the highest veneration to the cause of education, and free toleration of opinion. Without the least disparagement to the liberality of our Territorial government, it must be conceded that there is a wide difference between the institutions under the State, and those of the Territorial government. Sir JAMES MACKINTOSH says, "*that social institutions are not made, but grow.*" He did not live in the west, or he would add that they migrate and grow in a day. The want of adaptation of the old Territorial system to the new system under the Constitution of the State, unquestionably had great influence in producing the change that we find in the code.

To prove that the old system was inappropriate and deplorably defective, requires no comment. The universal judgment of the people had condemned it, and toleration only submitted to necessity, with the hope of a speedy reformation. It was cumbrous, expensive, confused and inadequate to the wants of society. All these difficulties were apparent and the subject of every-day complaint.

Under these circumstances, what could the commissioners do but look into the field of legislative progress, and seek for principles that were adapted to the condition of society, and contained in the Constitution of the State? Public opinion demanded great and radical changes, without particularly designating what those changes should be. Public expectation was high that these changes would be made, and that plain and simple rules easy in their application, and cheap in execution, would be substituted for the confused and expensive system that they were enduring.

The alternative then appears plain, that nothing but "*a new code*" would satisfy public expectation: nothing but "*a code*" could remedy the evil. This decided upon, the whole field of operations, and the difficult situation of the commissioners, will be apparent to every observing jurist. They commenced their labors, and at the session of the Legislature of 1850–'51 reported "a code" which was adopted with few alterations. That code is now the law of the land, and must remain so for two years.

The operation of this code is a subject of curious inquiry as well as earnest solicitude. Will it answer the ends contemplated? Can it be carried out and enforced? Will the next step be backward or forward? Are we in the path of progress, or have we staggered by the way and become lost in the fogs that so often overtake mistaken efforts at human progression?

Were we certain that we knew what the code contains, we could

venture an opinion with some hope of aiding the candid inquirer. That the commissioners have not based their labors upon the usual ground of law-makers, is apparent. They have not taken the old and settled rules that had become sanctioned by time and perfected by the purest intellects that ever existed, and from them selected the elements of the code.

It is well known that the "*Code Napoleon*" was the mere analysis and bringing together of the *leading cases;* principles long settled by the sages of the law; the mere extracting of principles that were scattered through many volumes which had received the stamp of approval, and were ruled because they were right.

The Livingston Code of Louisiana was a mere compilation of the civil laws, modified in their application to the new condition of society. Evidently the Code of Iowa has not followed these examples. The spirit of reform has been consulted, and its mandates are apparent on almost every page. We have already said, that if we knew what the code was, we could venture an opinion upon its merits. By this we do not wish to impeach it of obscurity or want of perspicuity in its language; but we mean to be understood that much is left for construction. The detail is wanting; particular directions are wanting. The discretion of the tribunals who are to execute, have more to do in reducing the code to practice, than the commissioners in framing it. For it must be conceded that in applying a mere abstract principle, much depends upon the mode of using it, and the justness of the application.

There is danger that different tribunals will give a different construction to the various parts of the code. Indeed, the code itself contemplates difficulties, and in order to avoid them, it confers an enlarged discretion upon the inferior Courts.

The greatest error in the whole code is this evident want of confidence in itself; this shrinking from a test of its own merits; this handing over to the varied intellects, whose duty it will be to carry out its provisions, the great work of modifying and fitting the machinery to do its work.

The step towards reform appears to be defective, the system intended imperfect, a compound of what we had, and what we want, of the old and the new.

It is better than the old system, if for no other reason than the divorce which it secures from confusion. But more than this, it contains the elements from which a *system will be made to grow.* In this country, where every thing is tested by the philosophy of thought, and where free discussion reaches every thing, there is little danger from the toleration of error.

CONFLICT OF LAWS. — FEDERAL AND STATE SOVEREIGNTY. — OPINION OF CHARLES B. GOODRICH, ESQ. — We have been favored with the following copy of the opinion of Mr. Goodrich. It is well worth preserving, as an able exposition of the views of a learned and thoroughly read lawyer, upon a law question of great importance.

Case Stated.

"Thomas Sims, said to be a fugitive from service or labor, due to a citizen of the State of Georgia, is now in the actual custody of Charles Devens, marshal of the United States, by virtue of an order or warrant issued by a commissioner of the United States, upon the application of the party, by his agent, to which the service is said to be due. He is also in the custody of said Devens, under and by virtue of an order or warrant issued by a commissioner of the United States, founded upon a complaint against Sims, for an alleged criminal offence against the laws of the United States."

Questions Proposed.

"1st. Has the sheriff of Suffolk County, a State officer, by himself or deputy, a legal right, by virtue of process, civil or criminal, issued by and under the authority of the Commonwealth of Massachusetts, to arrest and take the said Sims, from the custody of said Devens, against his consent, and for that purpose use such force as may be requisite to accomplish such seizure?

"2d. Suppose the criminal process in the hands of Devens shall be released, abandoned, or in any manner become inoperative, — the said Devens retaining the said Sims under the process by which he holds him as an alleged fugitive, — has the sheriff or his deputy, in such event, by virtue of State process, civil or criminal, a legal right to seize said Sims, and to use such force as may be adequate to divest the custody of said Devens?

Opinion.

"I have examined and carefully considered the two questions upon which an opinion is asked. I have no hesitation or doubt, in relation to the law applicable to the case stated in either aspect exhibited. The sheriff has no legal right or authority to divest the custody of the marshal of the United States, against his consent, under the state of facts presented in either of the questions proposed. If such attempt to use force should be made by the sheriff, it will be the right and duty of the marshal to resist, at all hazards, and the processes in the hands of the sheriff will afford him no protection for any consequence which may result from such a conflict of force. I suppose any person, even slightly conversant with the principles of jurisprudence, would readily answer the first inquiry as I have answered it. The solution of the second question is equally simple and clear, as is that of the first. Upon this, however, I am aware, a different opinion has been expressed by gentlemen of the legal profession, basing their opinion upon an assumption, that criminal process will defeat and override civil process. I will, therefore, state some of the reasons of my opinion upon the second question. The inquiry which results from the case stated, in its second supposed aspect, is not whether criminal process is paramount to civil process. It is whether the Commonwealth of Massachusetts can, by force, legally and rightfully dispossess the United States of a person of which the United States, by its officer, under its laws, has actual custody and possession. It is distinctly a question of sovereignty. The use or purpose to which the United States, the sovereignty in actual possession, may desire to devote the person which is in such possession, the use or purpose to which the Commonwealth of Massachusetts may design to appropriate the person, when the Commonwealth shall have obtained the same, are collateral and immaterial matters, when discussing the question whether the Commonwealth, by its officers, may legally use force to acquire the possession.

"The use and purpose of Massachusetts must be deferred until the use and purpose of the United States shall, in some legal manner, be compensated, satisfied or released; or until some judicial tribunal, having authority in the premises, shall adjudicate that the claim of Massachusetts is paramount to that of the United States, and thereupon stay or release, temporarily or permanently, as the case may be, the custody of the United States. The marshal of the United States, in relation to process in his hands, civil or criminal, is subject to the action and control of the judiciary of the United States, and if the Commonwealth of Massachusetts has a title to person or property, in the hands of the marshal, paramount, in a legal view, to the title of the marshal, the Courts of the United States are competent to direct him to deliver the person or property so held by him, to those having the paramount title. The result at which I have

arrived, may be illustrated by a variety of considerations, by every consideration which can legally be applied to the subject of discussion. The great argument, in opposition to the view presented, is that criminal process is and must be paramount to civil process. It is so when the civil and criminal processes issue from the same sovereign. The Commonwealth of Massachusetts, when it has a person or property in its custody and control, which is liable to several distinct obligations, some of a private character, some of a public nature, may well say, in conformity with its own laws, to which obligation, the person or property shall be applied It may well say its civil process shall be merged, suspended, or postponed by its criminal process and its exigencies. It cannot say, that the sovereignty of the United States, which has once rightfully attached to person or property, may legally be divested by force.

"If the supposed right of Massachusetts is paramount, upon legal principles, to that of the United States, its remedy is by application to the judiciary of the United States, which, if the assumption of the Commonwealth be well founded in law, will direct its officer and those acting under the authority of the United States to withdraw. The same result flows from the character of the authority which the law reposes in the sheriff. His official duties are circumscribed in their exercise to and within his legal precinct. The term 'precinct,' is technical, and in the English and in the American law ordinarily means a district, or a certain defined territory. This is not its only meaning; and in the complex system of government, under which the American people live, *ex necessitate*, must and does have a more extensive and a broader import. The precinct of the sheriff, territorially, embraces the County of Suffolk, and, in some specified cases, not material to the present inquiry, is extended beyond. So the precinct of the marshal of the United States embraces the same territory. When the marshal seizes person or property, within the territory common to both sovereignties, that of the United States, and of the State, *quoad* such person or property, they are, during the continuance of such seizure, without the legal precinct of the sheriff; when the sheriff makes the first seizure, and thereby has possession, the same result occurs as to the rights of the marshal.

"So it is a principle well established, that when two jurisdictions have concurrent authority, the one which is first exercised, so as effectually to attach, is no longer concurrent with, but becomes and is exclusive of the other. In a single word, every independent sovereignty is the exclusive judge of its own powers, and may and must determine the extent thereof, and will, so far as legal right is concerned, so determine, until put down, not by right, but by force — when its independence, its sovereignty will cease to exist. The result is therefore irresistible, that, when the marshal of the United States has a person in custody, under process issued by authority of the United States, a sheriff of the Commonwealth of Massachusetts, with a State process against the same person, cannot, by force, legally divest such custody for any purpose. Assume that the purpose to be accomplished by the State process is of more importance than the purpose of the process in the hands of the marshal, and is paramount thereto, the marshal may entertain a different opinion and act upon it. Neither the marshal nor the sheriff is charged by law with the responsibility of deciding at their peril any such difference of opinion or dispute. The marshal being in possession, has the legal right, until some judicial tribunal, having authority in the premises, shall adjudge that his title must yield to some other. These views are sustained by legal and constitutional authority; they constitute and result from the principles upon which our institutions stand, and upon which alone they can successfully stand.

"In a case before the late Mr. Justice Story, *The Invincible*, (2 Gallison, 44,) the Court say, 'The acts done under the authority of one sovereign can never be subject to the revision of the tribunals of another sovereign.'

"In *The United States* v. *Peters*, (5 Cranch, 115,) Chief Justice Marshall, in giving the opinion of the Court, says, 'The legislature of a State cannot annul the judgment, nor determine the jurisdiction of the Courts of the United States; if so, the Constitution becomes a solemn mockery.'

"In *Peck* v. *Jenness*, (7 Howard, 624, 625,) the Court adjudicate, in comformity with its previous uniform course of decision, that the Courts of the United States cannot seize upon property in the custody of the officers of a State Court, which had rightfully attached. The Court in its judgment says, 'Where the jurisdiction of a Court, and the right of a plaintiff to prosecute his suit in it, have once attached, that right cannot be arrested or taken away by proceedings in another Court. These rules have their foundation not merely in comity, but on necessity. For if one may enjoin, the other may retort by injunction, and thus the parties be without remedy; being liable to a process for contempt in one, if they dare to proceed in the other. Neither can one take property from the custody of the other by replevin, or any other process, for this would produce a conflict extremely embarrassing to the administration of justice.

"In *Brown* v. *Clarke*, (4 Howard, 4,) the Court say, 'In cases of conflicting executions issued out of the Federal and State Courts, a priority is given to that under which there is an actual seizure of the property first.'

"In *Hagan* v. *Lucas*, (10 Peters, 403,) it is said, 'Had the property remained in the possession of the sheriff, under the first levy, it is clear the marshal could not have taken it in execution; for the property could not be subject to two jurisdictions at the same time. The first levy, whether it were made under the Federal or State authority, withdraws the property from the reach of the process of the other. Under the State jurisdiction, a sheriff having execution in his hands, may levy on the same goods; and where there is no priority on the sale of the goods, the proceeds should be applied in proportion to the sums named in the executions; and where a sheriff has made a levy, and afterwards receives executions against the same defendant, he may appropriate any surplus that shall remain after satisfying the first levy, by the order of the Court. But the same rule does not govern where the executions, as in the present case, issue from different jurisdictions. The marshal may apply moneys collected under several executions, the same as the sheriff. But this cannot be done as between the marshal and the sheriff. A most injurious conflict of jurisdiction would be likely often to arise between the Federal and the State Courts, if the final process of the one could be levied on property which had been taken by the process of the other. The marshal or the sheriff, as the case may be, by a levy, acquires a special property in the goods, and may maintain an action for them. But if the same goods may be taken in execution at the same time by the marshal and the sheriff, does this special property vest in the one or the other, or both of them? No such case can exist. Property once levied on remains in the custody of the law, and it is not liable to be taken by another execution, in the hands of a different officer, and especially by an officer acting under a different jurisdiction.

"In the case, *Ex parte Dorr*, (3 Howard, 105), the language of the Court is decisive: 'Neither this nor any other Court of the United States, or Judge thereof, can issue a *habeas corpus* to bring up a prisoner, who is in custody under a sentence or execution of a State Court, for any other

purpose than to be used as a witness. And it is immaterial whether the imprisonment be under civil or criminal process. As the law now stands, an individual who may be indicted in a Circuit Court for treason against the United States, is beyond the power of Federal Courts and Judges, if he be in custody under the authority of a State. Dorr is in confinement under the sentence of the Supreme Court of Rhode Island, consequently this Court has no power to issue a *habeas corpus* to bring him before it.'

"Burge, in his treatise upon the conflict of laws, referring to the civil law for his authority, says — 'It is a fundamental principle essential to the sovereignty of every independent State, that no municipal law, whatever be its nature or object, should, *proprio vigore*, extend beyond the limits of that State by which it has been established. The limits of its operation are those of the authority by which it is imposed.'

"Cases in abundance, decided by State Courts, as well as cases decided by the Courts of the United States, may be cited in consonance with the views which are here presented. The question whether criminal process is paramount to civil, as already stated, does not and cannot arise, in discussing the questions proposed. State them in any and in every aspect in which they can be stated, and the result is a question of sovereignty. It is, whether the Commonwealth of Massachusetts can legally, by force, put down the Constitution, the laws, the Judiciary of the United States. I have no hesitancy in saying it cannot. If the marshal of the United States thinks fit to resist any and every forcible effort which may be made, if any shall be, to divest him of his custody, even although he hold only the fugitive warrant, until he shall be directed to surrender by some judicial tribunal having jurisdiction in the matter, no State process can be of any avail to shield or protect him who shall thus assail the marshal, and, through him, the sovereignty whose process he holds."

COURTS IN PENNSYLVANIA. Judges hereafter in this State are to be elected by the people. We give below the amended article of the Constitution. The popular vote was — for the amendment, 142,390, against it 71,352. The election of Judges will be on the 14th October, 1851.

"*Resolved, &c.* That the Constitution of this Commonwealth be amend- in the second section of the fifth article, so that it shall read as follows: The Judges of the Supreme Court, of the several Courts of Common Pleas, and of such other Courts of Record as are or shall be established by law, shall be elected by the qualified electors of the Commonwealth, in the manner following, to wit: The Judges of the Supreme Court by the qualified electors of the Commonwealth at large; the President Judges of the several Courts of Common Pleas, and of such other Courts of Record as are or shall be established by law, and all other Judges required to be learned in the law, by the qualified electors of the respective districts over which they are to preside or act as Judges; and the Associate Judges of the Courts of Common Pleas by the qualified electors of the counties respectively. The Judges of the Supreme Court shall hold their offices for the term of fifteen years, if they shall so long behave themselves well (subject to the allotment hereinafter provided for, subsequent to the first election); the President Judges of the several Courts of Common Pleas, and of such other Courts of Record as are or shall be established by law, and all other Judges required to be learned in the law, shall hold their offices for the term of ten years, if they shall so long behave themselves well; the Associate Judges of the Courts of Common Pleas shall hold their offices for the term of five years, if they shall so long behave themselves well, all of whom shall be commissioned by the Governor; but for any reasonable cause, which shall not be sufficient grounds of impeachment, the Governor shall remove any of them on the address of two thirds of each branch of the Legislature. The first election shall take place at

the general election of this Commonwealth next after the adoption of this amendment, and the commissions of all the Judges who may be then in office shall expire on the first Monday of December following, when the terms of the new Judges shall commence. The persons who shall then be elected Judges of the Supreme Court shall hold their offices as follows: One of them for three years, one for six years, one for nine years, one for twelve years, and one for fifteen years, the term of each to be decided by lot by the said Judges, as soon after the election as convenient, and the result certified by them to the Governor, that the commissions may be issued in accordance thereto. The Judge whose commission will first expire, shall be Chief Justice during his term, and thereafter, each Judge whose commission shall first expire, shall in turn be the Chief Justice; and if two or more commissions shall expire on the same day, the Judges holding them shall decide by lot which shall be the Chief Justice. Any vacancies happening by death, resignation, or otherwise, in any of the said Courts, shall be filled by appointment by the Governor, to continue till the first Monday of December, succeeding the next general election. The Judges of the Supreme Court, and the Presidents of the several Courts of Common Pleas shall, at stated times, receive for their services an adequate compensation, to be fixed by law, which shall not be diminished during their continuance in office; but they shall receive no fees or perquisites of office, nor hold any other office of profit under this Commonwealth, or under the Government of the United States, or any other State of this Union. The Judges of the Supreme Court, during their continuance in office, shall reside within this Commonwealth; and the other Judges, during their continuance in office, shall reside within the district or county for which they were respectively elected."

Courts in New Hampshire.—The Legislature at its last session altered somewhat the structure of the Courts. It authorized the appointment of four Circuit Judges of the Court of Common Pleas, two to be appointed at once, and the other two as vacancies shall exist in the Superior Court. This Court is now composed of a Chief Justice and four Associate Justices. The act provides that, as vacancies occur in the Superior Court, the vacancy shall not be filled, but an additional Circuit Judge shall be appointed, until there are four Circuit Judges. The Superior Court will then consist of a Chief Justice and two Associates, any two of whom will form a quorum. They will annually hold two terms of the Court only, both at Concord; one on the second Tuesday in July, the other on the second Tuesday in December. The Chief Justice of the Superior Court is also Chief Justice of the Common Pleas. This Court is now composed of the four Circuit Justices, and of the two County Judges for each county. Its terms will be held by one or more Justices of the Supreme Court, or by one or more Circuit Justices, and one or both of the Judges of the Common Pleas for the County. But at a capital trial, two Justices of the Superior Court, or of the Circuit Court, or one Justice of the Superior Court, and one of the Circuit Court must be present. Copies of cases and briefs must be furnished the Court and the opposing counsel.

William P. Wheeler, Esq., of Keene, and George Y. Sawyer, Esq, of Nashua, have been appointed Circuit Justices under this act.

Courts in Florida.—The General Assembly of Florida, in the session of 1850-51, established a separate Supreme Court, to consist of a Chief Justice and two Associate Justices. Walker Anderson, of Pensacola, has been appointed Chief Justice, and Albert G. Semmes, of Apalachicola, and Leslie A. Thompson, of Tallahassee, Associate Justices; and John

P. K. Savage, of Tallahassee, is Clerk. The salary of the Judges is $2000; the Clerk lives on his fees. The Supreme Court will hold four sessions annually: in Tallahassee, on the first Monday in January; in Jacksonville, on the third Monday in February; in Tampa, on the first Monday in March, and in Marianna on the third Monday in March. When any one or two of the Judges are disqualified from sitting in any cause, the vacancy is filled by a corresponding number of the Circuit Judges, who in that case make, for the time, a part of the Supreme Court. The Assembly likewise passed a law providing for an amendment of the Constitution, so as to give the election of the Justices of the Supreme Court and Judges of the Circuit Courts to the people; — which proposed amendment is subject to the action of the next General Assembly.

Courts in Missouri. — The Judges of the Supreme and Circuit Courts are now elected by the qualified voters of the State, for the term of six years. Previously they were appointed by the Governor. In August last was the first election, and Hamilton Gamble of St. Louis, John F. Ryland of La Fayette County, and William Scott of Cole County, were elected Justices of this Court. There were elected at the same time fourteen Circuit Judges. One of the former Judges of the Supreme Court, and eleven of the former Circuit Judges, were elected.

Michigan and Kentucky made new Constitutions in 1850; and Ohio, Indiana, Maryland and Virginia, have made new ones this year. In all of these States Judges were formerly appointed by the Governor; they are now, by the Constitutions of the several States, elected by the people, except the Chief Justice in Maryland, who is appointed by the Governor. A proposed amendment of the Constitution of Louisiana is now before the people for adoption, providing for the election of the Judges of the Supreme Court, now appointed by the Governor, by the people.

Prize Dissertations in the Law School at Cambridge.—The Committee to award prizes for the best Dissertations, the last year, were Hon. Milo L. Bennett, of Vermont; Hon. Thomas F. Carpenter, of Rhode Island; Hon. E. Fitch Smith, of New York. They awarded, for dissertations upon "The rights and liabilities of Rail Road Corporations," by students three terms in the school — To Arthur Webster Machen, of Fairfax county, Virginia, the first prize of sixty dollars; to Thomas Hitchcock, of the city of New York, the second prize of fifty dollars. For dissertations upon the law of "Landlord and Tenant," by students two terms in the school — To Lemuel Shaw, Jr., of Boston, the first prize of fifty dollars; to Alfred Russell, of Plymouth, N. H., the second prize of forty dollars.

Notices of New Books.

The Act to Amend some of the Proceedings, Practice and Rules of Evidence of the Courts of this Commonwealth, passed by the General Court of Massachusetts in the year 1851; accompanied with Notes, References, and a general Analysis of the Act. Also other Acts passed at the same Session which relate to Practice; with an Appendix, containing the Law Commissioners' Report, a few Practical Forms, a Calendar of the Courts, Return Days, and the Rules of Court established in pursuance of the Act. Prepared by Junius Hall, of the Boston Bar. 1 vol. 8vo. pp. 276. Boston: Charles C. Little and James Brown. 1851.

The act itself, with the forms reported by the Commissioners and con-

tained in the act as passed by the Legislature, and the rules of the Supreme Court and of the Common Pleas, established in pursuance of this act, have already been published in the Reporter. The additional acts contained in the volume, are — 1. The act extending certain sections of the Practice Act to Justice Courts; 2. The Act empowering any party to a suit in the Common Pleas, whose exceptions or motion for a new trial are there disallowed or overruled, to file his exceptions, &c. before the Supreme Court; and 3 The act concerning Defendants in Actions on Joint Contracts. The analysis of the act, written by Mr. Hall, occupies fifty-two pages of the volume, and is a well-written and careful statement of the changes effected and contemplated by the act in the several titles of the law. In this analysis frequent reference is made to the Revised Statutes and the Massachusetts cases touching the points discussed, so that the analysis is in fact almost a treatise on Practice. There are also twenty pages of additional forms, maturely considered, which will be of great use to the practitioner.

The volume contains an unusually full Index, which, with the Calendar of Courts, was prepared by GEORGE S. HALE, Esq., who superintended the publication of the volume after a severe and ultimately fatal illness had compelled Mr. Hall to relinquish the task.

The volume is an excellent handbook for practitioners. As its title shows, it contains every thing relating to the New Practice Act, well arranged, and with a full Index for reference. When the act has been fairly tried, and its defects and imperfections supplied by legislation, we have little doubt but that it will accomplish all its framers intended.

To those who are acquainted with its author, the volume will always have an especial value. To them the tribute paid Mr. Hall in the preface of the work, and the obituary notice which another member of the Bar has contributed to this number of the Reporter, are unexaggerated expressions of the esteem in which he was held while living, and of the respect which is now felt for his memory.

REPORTS OF CASES ARGUED AND DETERMINED IN THE SUPREME COURT OF THE STATE OF VERMONT. Vol. XXII. New Series. By PETER T. WASHBURN, Counsellor at Law. Vol. VII. pp. 733. Woodstock: published by Haskell & Palmer. 1851.

The Vermont Reports, both from the ability and learning of the Court whose decisions are reported, and from the fidelity and accuracy with which the reporter performs his duties, are among the very first in the country. The present volume fully maintains the reputation which the preceding ones had acquired It contains one hundred and eighteen cases in the State Courts, and five cases in the United States Courts, all decided by Judge Prentiss, which, by the act of Vermont of 1846, the reporter is authorized to publish when gratuitously furnished him by the Judges. We notice that one of the cases (*Thetford* v. *Hubbard*, p. 440), was an action brought by a town on a promissory note, which was given to the town for the price of the office of constable, which was set up at auction in open town-meeting, and sold to the defendant, who was the highest bidder, for $16.50, for which he gave the note in suit. The defence was, that the consideration, being the sale of an office, was illegal. There is a statute upon the subject, which the plaintiffs alleged allowed such sales. Upon this the Court says — "The statute is too explicit, and the practical construction has been too long and uniformly in favor of such a construction to be now brought in question. And we think, the practice of putting the office up at public auction has not been without frequent and early precedents, in some sections of the State. And we see no objections to the mode. Every voter is to be esteemed competent to discharge the duties of any office to which he can obtain an election; the only other requisite

qualification for this office, under our statute, is, that he will give the highest price for the office. This will best be determined by bidding, and he must then be regularly instituted into the office by an election, — which two things, paying the highest price, and getting the greatest number of votes, estops every one from denying, that he is the most suitable person for the office."

REPORTS OF CASES ARGUED AND DETERMINED IN THE SUPREME COURT OF RHODE ISLAND. Vol. I. By J. K. ANGELL. Boston: Charles C. Little and James Brown. 1847.

It has taken more time "to get the hang of" this book, than it would take to perambulate the State, the decisions of whose Supreme Court it reports. The date on the title-page is 1847, sufficiently far back, one would think, for a *new* book; yet the decisions in the latter part of the volume are down to as late a period as March Term, 1851. The volume purports to be of cases argued and *determined*, yet a note at the end of the volume refers to one of the reported cases as having been reheard, and being "still pending before the Court on a petition for a new trial, upon exceptions to the rulings of the Court;" and upon examination several *nisi prius* cases are found, in which the law laid down by the presiding Judge is doubtless sound, yet it hardly reaches the dignity of a case that has been "argued and determined." The title-page states that the cases are reported by J. K. Angell, yet midway in the book it appears that Mr. Durfee is appointed in place of Mr. Angell, resigned. By dint of searching, however, we make out the "history" of the volume in this wise. Some time prior to 1847, under an act of the General Assembly, Mr. Angell was appointed Reporter by the Supreme Court. In the discharge of his duties as Reporter, he published a pamphlet volume, to which the above was the title-page, which he offered to the public as No. 1 of Vol. I. of Rhode Island Reports. This contained twelve cases, which were decided prior to the appointment of the Reporter, but in which he found written opinions of the Court, filed with the usual papers; one of these decisions was made as far back as 1828. This pamphlet closed with the 53d page of the present volume. From the 63d to the 140th page are other decisions of the Court, made, some before, and some after the appointment of Mr. Angell. There is also in the same pages an obituary notice of Chief Justice Durfee, who died July 26, 1847. Pages 141 and 142 are blank except this announcement: "In Providence, at the September Term of the Supreme Court, A. D. 1849, Joseph K. Angell, Esq. resigned the office of Reporter of the Decisions of the Supreme Court, and Thomas Durfee, Esq. was appointed to succeed him." This, so far as appears, is the only announcement in the volume of the connection which Mr. Durfee has with the book. The presumption is, and perhaps it is not a very violent one, that Mr. Durfee is responsible as Reporter, for the correctness of all the cases on and after page 143 of the volume. In those pages, are included cases from March Term, 1840, to March Term, 1851, among which are the *nisi prius* cases, before referred to. The volume also contains the several Rules of Court.

Apart from these imperfections and obscurities which, after all, affect only the form of the work, the volume is a valuable one. With regard to the cases reported by Mr. Angell, it is needless to say that they are well done, and Mr. Durfee appears to have been careful and exact in his labors.

ENGLISH REPORTS IN LAW AND EQUITY; containing Reports of Cases in the House of Lords, Privy Council, Courts of Equity and Common Law, and in the Admiralty and Ecclesiastical Courts; including also Cases in

Bankruptcy, and Crown Cases reserved. Edited by EDMUND H. BENNETT and CHAUNCEY SMITH, Esqs., Counsellors at Law. Vol. III. pp. 645. Containing cases in the House of Lords, Privy Council, and in all the Courts of Equity and Common Law in Mich. Term, 1850, and Hilary and Easter Terms, 1851. Boston: Charles C. Little and James Brown. 1851.

Upon the receipt of the first volume of this excellent series of Reports, we stated, in the June number of the Reporter, the plan of the publication, and the manner in which the editors had performed their labors. The two volumes since published confirm fully the opinions then expressed. The second volume contains one hundred and thirty-one cases, and the third one hundred and forty-two, all of which have been decided since Michaelmas Term, 1850. We notice an increase in the number of the Editors' notes, over those in the first volume, particularly in the third volume.

New Book received.

A PRACTICAL TREATISE OF THE LAW OF VENDORS AND PURCHASERS OF ESTATES. By the Right Hon. Sir EDWARD SUGDEN. In two volumes. Vol. I. pp. 613. Vol. II. pp. 757. With Notes and References of American Decisions on the Law of Vendors and Purchasers, to the present time. By J. C. PERKINS, Esq. Seventh American, from the eleventh London edition. Springfield, Mass.: Published by George & Charles Merriam. 1851.

Obituary Notices.

DIED, in New Haven, Conn., May 26, 1851, Hon. SIMEON BALDWIN, aged 90.

Judge Baldwin[1] was born December 14, 1761, in the town of Norwich, in what is now the State, but was then the Colony of Connecticut. He was the youngest among seven children of Ebenezer Baldwin, the grandson of Thomas Baldwin, and great grandson of John Baldwin, the first ancestor of this branch of the Baldwin family in this country. John Baldwin came from England with the Puritan emigrants from the counties of Bucks, Surry and Kent, who accompanied their pastors, Rev. Messrs. Davenport, Prudden and Whitfield, and began the settlement of New Haven, Milford and Guilford. Of these emigrants, six families bore the name of Baldwin. John Baldwin's name appears on the records of the town of Guilford, in the tax list of the planters and inhabitants of that town, in 1646. It appears, also, from these records, that he was married there in 1653, and had a son born there in 1654, and a daughter in 1656; and it appears, moreover, from the records of Norwich, that he was one of thirty-five proprietors who purchased and settled that town in 1660. At that time he removed with his family to that place, and took up his residence on the town lot assigned to him. On this same spot were born his son Thomas, his grandson Ebenezer, and his great grandson Simeon. He lost his own mother when a little more than a year old; but her place was well supplied by the second wife of his father. His father combined, as is often the case in the early history of colonies, mechanical and agricultural pursuits. He was a man trusted, honored and useful in the civil and religious affairs of Norwich, an active member of the church, a magistrate of the town, and its representative in the General Assembly.

Mr. Baldwin, thus favored by early parental influence, was also eminently favored in the instruction which for a time he received in studies preparatory for admission to college. He went, at the age of thirteen, to reside in the family and under the tuition of his oldest brother, Rev. Ebenezer Baldwin, pastor of the Congregational church in Danbury, who was then, though in early life, one of the most eminent ministers, accomplished scholars, and active philanthropists and patriots in the colony. Judge Trumbull, in a memoir of his own life, and the various writers on the history of Yale College, makes honorable mention of him as one of an able body of tutors, who, entering upon their office at a period when the college had

[1] This notice is taken chiefly from an Address, delivered at the funeral of Judge Baldwin, by the Rev. Mr. Dutton, of New Haven.

fallen into disfavor among many of the civilians of the State, and was in a great measure forsaken by its students on account of general dissatisfaction with its administration, by their eminent scholarship, affable manners, efficient authority, and modes of instruction adapted to the progress of the times, contributed much to raise again its reputation, restore it to confidence, and repair its prosperity. The late Chancellor Kent, who was under his tuition at Danbury, with Simeon Baldwin, whose classmate he was in college, and through life his admiring and familiar friend, in an address before the Phi Beta Kappa Society, in 1831, alludes to Rev. Ebenezer Baldwin, as his early preceptor, with an affectionate warmth which time had not chilled and death had hallowed, and gives a touching tribute to his worth and virtues. He calls him "a great and excellent man," and gives a glowing eulogy on his piety, his learning, his eloquence, judgment and patriotism.

Judge Baldwin commenced his studies with his brother, in Danbury, at a most trying period of our American history, in 1774, when the colonies were burdened under the oppressive measures of the British government. His recollections of that period were vivid and accurate; and he often spoke in late years of the active part which his brother took in that work preparatory to our struggle for civil liberty, thinking that struggle sacred, chiefly because it involved religious liberty. A vivid idea of the vast changes which have taken place during his lifetime is conveyed by a fact that he often narrated. A rumor reached Danbury that a battle had been fought on Bunker's Hill, but no definite intelligence had been received there of its character or issue. This was nearly three weeks after the battle. So, to procure satisfactory information, Simeon Baldwin, then fourteen years old, was sent on horseback fifteen miles to the house of the clergyman in New Milford, to borrow the Hartford paper, which contained an account of that engagement. On his return the inhabitants of the town assembled in great numbers around the house of his brother to hear it read.

But the distinguished advantages of our friend under the tuition of his brother, after continuing about two years, were calamitously cut off. In the impending and gloomy campaign of 1776, when the defence of New York, threatened by the British army of 30,000 men, well disciplined and well equipped, had become nearly desperate, Rev. Ebenezer Baldwin, (we use here the language of Chancellor Kent) "was incessant in his efforts to cheer and animate his townsmen to join the militia, which were called out for the defence of New York. To give weight to his eloquent exhortations, he added that of his heroic example. He went voluntarily as a chaplain to one of the militia regiments. His office was pacific, but he nevertheless arrayed himself in military armor. I was present (adds Chancellor Kent,) when he firmly and cheerfully bade adieu to his devoted parishioners and affectionate pupils." This was about the first of August, 1776. Soon after his arrival at New York, Simeon, then fourteen years old, went at his summons on horseback to carry to him some clothing and provisions. He remained a short time in New York, and was sent back by his brother, who anticipated the next day an attack from the enemy's forces. When the anticipated attack took place, Mr. Baldwin's horse was taken with all his luggage. The loss of his clothing subjected him to severe exposure, especially in the chilly nights; which, with other hardships of his service in ministering to the sick and suffering soldiers, resulted in a fever that prevailed in the camp. Intelligence of his sickness was immediately sent to Danbury, and Simeon was dispatched to New York to convey him to his home; which he accomplished, though they were detained for a time at a town on the way by the severity of his brother's disease. He then went immediately from Danbury to Norwich to summon the family friends. They arrived just in season to hear the last words, and witness the death, at the early age of thirty-one, of this, one of the most promising and heroic of the clerical martyrs to our national freedom. His eminent reputation and worth may be inferred from the fact, that, notwithstanding his youth, he was the favorite candidate for the presidency of Yale College, then occupied *pro tempore* by Professor Daggett, and would undoubtedly have been chosen to that office, had his life been continued.

Being thus deprived of the instruction of his brother, Mr. Baldwin pursued his preparatory studies partly at Coventry, with Rev. Mr. Huntington, and partly at Lebanon, at the school of Mr. Tisdale, then a teacher of high reputation in Connecticut. He entered Yale College in the year 1777, during the presidency of Rev. Dr. Daggett, and graduated with honor in 1781. Of that class he was the last survivor. The whole of his college life was in the stormy and exciting period of the revolutionary war, and at times the college was entirely forsaken, the students being distributed under the care of their instructors, in different towns in the State. They were in New Haven, however, at the time of the attack on this place by detachments of British troops under Generals Tryon and Garth: and Mr. Baldwin with a company of his fellow-students, joined the forces which were hastily collected to resist them, at what was then and is now called "Neck

Bridge," a bridge over the western branch of the Quinnipiack river, near Cedar Hill. He participated at that point in a skirmish, in which a man standing near him was shot.

During the year after his graduation, he commenced the study of the law, in New Haven, with Judge Chauncey; but in the next year, having been appointed, in connection with John Lovett of the next following class, to the charge of the Academy at Albany, he removed to that city; where he resided in the family of Peter Yates, then an eminent lawyer in that place, of whose valuable law library he availed himself for the continuance of his professional studies so far as was compatible with his duties as teacher. He there formed a pleasant acquaintance with Edward and Brockholdst Livingston, who were both pursuing their legal studies at that time under the direction of Mr. Yates. At that time there were but sixteen counsellors at the bar in the whole State of New York, with all of whom Mr. Baldwin became acquainted. In 1783, two years after his graduation, he entered on the office of tutor in Yale College; which he filled with ability and fidelity for three years, pursuing at the same time the study of law with Judge Chauncey, till 1786, when, with his early and life-long friend, David Daggett, he was admitted to the bar of New Haven County, and entered on the practice of his profession in New Haven. Four years after, in 1790, he was appointed by Judge Law, Clerk of the District and Circuit Courts of the United States, and continued to perform the duties of that office, in connection with an extensive professional practice in the State Courts, for thirteen years, till the autumn of 1803, when he was elected a representative from Connecticut of the eighth Congress of the United States, with Roger Griswold, Calvin Goddard, and S. W. Dana as his associates. He attended the two sessions of that Congress, which expired in 1805, when he declined a re-election, resumed his practice at the bar, and was re-appointed by Judge Law, Clerk of the District and Circuit Courts. In 1806, when he was forty-five years of age, he was appointed by the Legislature of the State an Associate Judge of the Superior Court and of the Supreme Court of Errors. In that office he was continued for eleven years, by annual appointment, which was the custom under the old Constitution, till 1817, when the Federal party went out of power in the State. He then returned to his practice at the bar. In 1822 he was appointed by the General Assembly one of the commissioners to locate the Farmington Canal, and was made President of that board. In 1826 he was chosen Mayor of the city of New Haven. In 1830, in his 70th year, after having seen the canal located and completed to the Connecticut river at Northampton, he resigned his position as commissioner, and afterwards held no public office. The practice of his profession, however, as counsellor and adviser, chiefly at his own office, he pursued, notwithstanding his age, till within a few years.

During his practice at the bar, before he was appointed Judge, he occasionally taught in his office students at law, some of whom in after-life became eminent. Among these may be mentioned the late Jeremiah Mason, who cherished for him through life a respectful and affectionate regard.

At the age of twenty-six, about a year after he was admitted to the bar, Mr. Baldwin married Rebecca, daughter of the Hon. Roger Sherman, of New Haven. She deceased in 1795, after a married life of eight years, having been the mother of four children. Of these, two survive him, one of whom has always dwelt under her father's roof in the constant and affectionate exercise of filial fidelity and devotion. The other is Hon. Roger Sherman Baldwin, late Senator of the United States from Connecticut. Five years after the death of his first wife, on the 13th of April, 1800, Mr. Baldwin married Elizabeth, another daughter of Hon. Roger Sherman, and widow of Sturges Burr. She died in 1850, at the age of eighty-five. Five children were the offspring of this marriage, two of whom survive.

Judge Baldwin had so far outlived his generation, that very few in the State have any adequate recollection of his administration of the judicial office. One of the few, Hon. Thomas Day, then and now Reporter of the Supreme Court of the State, has given his opinion of the judicial character of Judge Baldwin — an opinion with which Chief Justice Williams has expressed entire coincidence. "Every body, [says he,] in New Haven, knew Mr. Baldwin as a man; a few may recollect him as a lawyer. I had good opportunities of knowing him as a Judge; but all that was distinctive of him in that capacity may be said in a few words. His judgment was sound, the result of thorough investigation and reflection. He was as free from bias as any man that ever gave an opinion. He was not deficient in the learning obtained from books; but he relied more on his own good sense than on the subtleties or refinements of the law. He had less versatility than some other men. Indeed, the excellence of Judge Baldwin consisted in his being always the same — the same upright, deliberate, intelligent man. His leading qualities as a Judge were those which were conspicuous in him every where. Every body had confidence in him, whether on or off the Bench."

The degree in which Judge Baldwin retained his intellectual and most of his bodily powers was very extraordinary; owing, doubtless, partly to a good native constitution, but more to a wise temperance and his entire equanimity. His hearing was indeed seriously impaired; but his form, to the last, as erect, and his step almost as firm as in youth. And in his mind there was no perceptible failure, even in his fourscore and tenth year. Three years since, he appeared before a committee of the Legislature, and argued a cause in which he was interested, as ably as if he had been in his meridian. And lately, at a meeting of the bar of New Haven county, occasioned by the death of Judge Daggett, he made a brief address, without opportunity of preparation, with all the clearness, method and justness of thought and expression, for which he had ever been distinguished.

In Boston, August 2, Junius Hall, Esq., aged 39.

Mr. Hall was a native of Ellington, Conn. He was the son of Hon. John Hall, for some time Judge of Tolland County, Ct., and also for several years Judge of Probate; a man of distinguished purity and benevolence, a profound scholar, and an intelligent Christian. From his father Mr. Hall undoubtedly inherited many of his finest traits of character, and much of his peculiar comprehensiveness and vigor of mind. Mr. Hall, after an honorable career at Yale College, commenced the study of the law, and upon the completion of his initiatory studies went to Alton, Ill., where he soon attained an enviable eminence in his profession.

The quiet manliness, the calm perseverance, the clear, direct energy, and the unwavering integrity of Mr. Hall, soon won him not only the highest respect of his immediate associates, but a degree of public confidence and regard which few men ever reach. He was compelled, however, in a few years, by the failure of his health, to abandon the largely lucrative practice and high professional rank he had acquired. He came to Boston, and had scarcely become known and in some measure appreciated, when he was called upon to relinquish the toils and triumphs of an earthly life for a higher service and a more enduring fame.

Mr. Hall was a fine illustration of those qualities which distinguish the true lawyer. He had a fervent love for the noble science of law; a love which arose not from the mere motive of pecuniary interest, but from a fine appreciation of the dignity of the origin of law, the beneficence of its authority, and the logical harmony of its organizations. This, the first element of high professional success, led Mr. Hall to a familiar study of the great principles of the common law. He was not a mere statute lawyer, one of those whose only ideas of legal learning are derived from the perplexing intermeddlings of tinkering Legislatures, whose armory contains only swords of lath, and shields of brawn; but he was schooled in those old books which are the fountains of juridical wisdom; and thus law became to him a common subject of thought, not merely the means whereby he might get his daily bread, but the companion of his leisure hours, the source of his finest intellectual pleasures. This love of the science made him diligent, patient, accurate in the application of his knowledge to the business of his profession; it gave a dignity to the common offices of legal duty; it led to a kindly sympathy with his clients, and excited a more than ordinary courtesy towards his brethren. It also gave a fine moral tone to his professional life. He felt it beneath the lawyer as well as the man, to make his learning and skill subservient to base or wrongful purposes. He repelled with contempt every inducement to become the instrument of the slightest injustice; he demanded honesty from others; he was scrupulously honorable himself; his word was a Stygian oath. His professional life was controlled by the same high Christian principles which directed him as a citizen and as a man.

The great point of his character, the most marked feature of his life, was its calm self-possession. Nor was this the quiet of apathy, the calmness of indifference; for he was ever active, ever vigilant, but not for himself: his life was devoted to the service of others. And thus amid all the turbulence and angry strife of the world he moved on calmly, because unselfishly. Besides, in a clear faith in God, he had an inward strength that no outward pressure could disturb. Conscious of the highest duties of life, he performed them with an even will and a Christian integrity.

His death is a great sorrow to all who knew him. But it is also a public loss, for the reputation which Mr. Hall won, as a member, from this city, of the last Legislature, for judicious, intelligent, legislative power, was the just meed of his ability, and indicative of high public honor. He would have been a great ornament and strength to the State, if he had lived. But apart from any consideration of public service, the death of such a man is always a public loss; for pure, unselfish men are much too rare, in their departure, to leave no void in society. We sorrow, but not for him — for the contemplation of his life is full of solemn pleasure. "It was a life whose value can only be appreciated now, when he has

been called to receive his reward in that better world, the passport to which he sought so diligently, in youth as in manhood, in happiness as in sorrow, to obtain."

Insolvents in Massachusetts.

Name of Insolvent.	Residence.	Commencement of Proceedings.	Name of Commissioner.
Averill, Joseph W.	Boston,	Aug. 28,	John M. Williams.
Ayres, Leonard	N. Bridgewater,	" 29,	Welcome Young.
Bell, Robert G.	Lowell,	" 1,	S. P. Adams.
Brigham, Sidney	Stow,	" 28,	Asa F. Lawrence.
Brown, James	Lowell,	" 26,	S P. Adams.
Buffum, Edward S.	Salem,	" 21,	John G King.
Bullock, Henry	Taunton,	" 25,	E. P. Hathaway.
Carleton, Pettengill G.	Haverhill,	" 8,	John G. King.
Churchill, William	Boston,	" 13,	John M. Williams.
Conant, Charles	Leominster,	" 26,	Charles Mason.
Crowley, Thomas	Worcester,	" 27,	Henry Chapin.
Feely, James M	Woburn,	" 29,	Asa F. Lawrence.
Fiske, Evan A.	Upton,	" 7,	Henry Chapin.
French, Rufus et al.	Boston,	" 8,	John M. Williams.
Garfield, Geo. R.	Templeton,	" 12,	Henry Chapin.
Garfield, Wm. H et al.	Boston,	" 8,	John M. Williams.
Goodrich, John Z.	Stockbridge,	Sept. 10,	Thomas Robinson.
Graves, Samuel W.	Springfield,	Aug. 30,	A. W Stockwell.
Greenwood, Joseph et al.	Boston,	" 6,	C. B. Goodrich.
Hancock, Marshal	Barre,	" 28,	Charles Brimblecom.
Hardy, Ira	Groveland,	" 23,	Daniel Saunders, Jr.
Harris, Thomas W.	Andover,	" 27,	Daniel Saunders, Jr.
Hatch, Cyrus M.	Roxbury,	" 25,	Francis Hilliard
Healy, Reuben	Abington,	" 26,	Welcome Young.
Houghton, Mary E.	Boston,	" 8,	John M. Williams.
Howe, Thomas	Wilmington,	" 22,	S. P. Adams.
Hunt, Joseph W.	Otis,	" 21,	S. E. Field.
Hyde, Henry	Lynn,	" 14,	John G. King.
Jencks, George W.	Springfield,	" 23,	A. W. Stockwell.
Jenney, Bernard	Boston,	" 26,	C. B. Goodrich.
Jenney, Stephen,	Boston,	" 26,	C. B. Goodrich.
Jenney, Stephen, Jr.	Boston,	" 26,	C. B. Goodrich.
Johonnot, Charles H.	Boston,	" 14,	C. B. Goodrich.
Kilborn, Joel	Great Barrington,	Sept. 2,	S. E. Field.
Leavitt, Daniel G.	Lowell,	Aug. 30,	S. P. Adams.
Leland, John	Millbury,	" 28,	Henry Chapin.
Livermore, Aaron	Roxbury,	" 5,	John M. Williams.
Loring, George	Concord,	" 13,	Asa F. Lawrence.
Marvin, Wendell P.	Boston,	" 8,	John M. Williams.
Mitchell, James	Boston,	" 2,	C. B. Goodrich.
Morrill, Nathaniel W.	Lowell,	" 28,	S. P. Adams.
Norcross, Hiram et al.*	Brookline,	" 16,	Francis Hilliard.
Palmer, Edwin A.	Boston,	" 22,	C. B. Goodrich.
Pollard, Isaac	Abington,	" 1,	Welcome Young.
Pratt, Willard A.	Bridgewater,	" 7,	Welcome Young.
Prince, John B.	Lynn,	" 16,	John G. King.
Proctor, Charles	Sandwich,	" 29,	Zeno Scudder.
Putney, John	Lowell,	" 1,	S. P. Adams.
Rich, Richard F.	Milford,	" 30,	Henry Chapin.
Richardson, Josiah C.	Leominster,	" 16,	Charles Mason.
Ripley, Joseph	Shutesbury,	" 10,	D. W. Alvord.
Robbins, Joseph H.	Winchendon,	" 18,	Charles Mason.
Roberts, George et al.	Boston,	" 13,	John M. Williams.
Sanford, Thomas E.	Dartmouth,	" 16,	E. P. Hathaway.
Shorey, Thomas H.	Spencer,	" 27,	Henry Chapin.
Smith, George M.	Conway,	" 16,	D. W. Alvord.
Smith, Theophilus	Harwich,	" 19,	Zeno Scudder.
Smith, Willard	Needham,	" 20,	Francis Hilliard.
Sprague, Joseph G.	Amherst,	" 25,	Myron Lawrence.
Story, James F.	Essex,	" 30,	John G. King.
Thompson, Isaac	Wayland,	" 22,	Asa F. Lawrence
Wilson, Thomas P.	Boston,	" 18,	John M. Williams.
Young, George W.	Lowell,	" 30,	S. P. Adams.

* The names of the firm were not returned by the Commissioner.